

**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

CLOSING SUBMISSIONS OF THE DEFENDANT, CITY OF OTTAWA

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EXECUTIVE SUMMARY

1. The Defendant, the City of Ottawa (the “City”) is the municipal government of a large, diverse and growing city of a million people. The City exercises the authority delegated to it by the Province of Ontario to regulate, and act, in the public interest, for the benefit of its constituents. In doing so, the City must balance a complex milieu of competing viewpoints, clashing interests, diverse stakeholders, statutory constraints, and demands for scarce resources to act in a manner that best promotes the public good, while ensuring the safety and wellbeing of its citizens above all else. This is the approach that the City has always taken, with all the industries that it regulates, including the taxi industry. Faced with the arrival of a technology that was new, innovative, disruptive, and popular the City took the same approach.

2. For decades, the City and its predecessors have imposed regulations on the taxi industry, and enforced those regulations, in an effort to ensure that the taxi industry operated in a manner that was safe for the public and fair to consumers. The City’s regulatory approach was premised on two fundamental pillars: (1) controlling the number of taxis that could operate by restricting the number of taxi plates to ensure that vehicles and drivers met standards of safety and quality; and (2) regulating the fare that taxis could charge to ensure that consumers were not taken advantage of. At all times, the City and its predecessors retained ownership of taxi plates. Further, a time-limited, renewable license, such as a taxi plate, does not constitute property at common law.

3. The City permitted taxi plates to be transferred between licensees, to help foster its regulatory goals of public safety and consumer protection. Allowing the transfer of plates helped free up scarce enforcement resources that would otherwise have been occupied in attempting to prevent plate holders from circumventing a ban on transfers. The regulatory approach taken by the City, with limited and transferable plates and regulated fares, was broadly consistent with the approach taken by cities across North America.

4. Ensnared in its monopoly of vehicle for hire (“**VFH**”) services and without any competition, the taxi industry stagnated, and consumers became dissatisfied with the industry’s customer service. Taxi plates were treated as speculative assets, and were held in increasingly large concentrations by the taxi industry elite. By 2015, one percent of the taxi plate holders in the City held 25 percent of the plates, and three out of every four licensed taxi drivers had to pay rent simply for the privilege of operating a taxi. Many of the single plate holders that did manage to acquire rights to a taxi plate did so without undertaking basic due diligence.

5. At all times, two things remained true: (1) the City owned the taxi plates; and (2) the relationship between the plaintiffs and the City was the relationship between a regulator and a regulated industry. Nothing less, but certainly nothing more.

6. Into this context, in September of 2014, came a new and innovative ridesharing technology: Uber. Though it had spread rapidly throughout the United States and Europe, Ottawa was just its second Canadian city. The City immediately began to enforce its taxi by-law against Uber drivers on the basis that they were providing taxi service without a license. The City’s enforcement efforts against Uber drivers continued for two years, with the City deploying unprecedented resources to overcome unprecedented technological challenges. The City continually adapted its enforcement tactics and attempted to overcome the statutory constraints on its enforcement power. In the midst of these enforcement efforts, the City of Toronto brought and lost an application for an injunction against several of the corporate entities affiliated with Uber. As a result of this decision, it became clear to the City that it would likely be unable to take successful enforcement action against those entities, and so it made the reasonable decision to keep its enforcement focused on Uber drivers.

7. Uber’s technology was innovative and was an improvement over many of the aspects of taxi service that consumers found most frustrating. As of May 2015, it operated without any regulatory protections for the public. The City thus embarked on a lengthy and comprehensive regulatory review, guided by the principles of consumer protection, public safety, and accessibility, to determine how the

new technology should be addressed from a regulatory perspective. That review involved extensive research and study of the issues, including wide-ranging consultation with the general public and key stakeholders. Representatives of the taxi industry and members of the plaintiff class were extensively consulted and had direct access to decision-makers throughout the course of the review. Their suggestions and their concerns informed the review at every stage.

8. In making any policy decision, the City must balance a multiplicity of competing viewpoints and priorities to achieve an outcome that most benefits its constituents as a whole. The City's decision after carrying out its review was to enact By-law 2016-272 (the "**2016 By-law**"). The 2016 By-law is the fruit of City Council making hard policy choices after having heard from experts, taxi industry participants and the citizenry over a number of months. It regulates a business which had garnered substantial market demand and was not previously regulated, while eliminating some existing regulations for taxi services. It is consistent with the regulatory approach to ridesharing services taken by jurisdictions across Canada and the United States and was the approach that provided the most benefit and protection to the citizens of the City.

9. As is the case with policy choices, some constituents are pleased, some are indifferent, and some are upset. The essence of this claim is that the plaintiffs are upset with the City's policy choices. They seek to use this Court to rewind the policy clock to a time when ridesharing did not exist, when they did not have to compete with innovative technology, and when taxis were the only option. They attempt to cloak this dissatisfaction with City policy in the language of negligence and discrimination.

10. The plaintiffs claim that the City owes them a duty of care to protect their potential for return on speculative investments. No such duty exists. The City is a government that acts and regulates in the public interest. It is not the guarantor of the financial returns of an industry. The plaintiffs claim, without evidence, that the City's unprecedented enforcement efforts against Uber were unreasonable. They seek, without justification or authority, to hold the City to a standard of perfection.

11. In addition to their negligence claim, the plaintiffs have also framed their claim under section 15(1) of the *Canadian Charter of Rights and Freedoms*. This section guarantees equal benefit of the law without discrimination. Any law that discriminates on the basis of race, national or ethnic origin, colour, or other personal characteristics is unconstitutional, subject to the limits set out in section 1 of the *Charter*. The plaintiffs are claiming that the City's regulation of the VFH industry, including the 2016 By-law, is discriminatory on the basis of race and national origin, and is therefore unconstitutional.

12. The plaintiffs' discrimination claim defies logic and common sense, and lacks support in the evidentiary record. The plaintiffs point to the statistical analysis of Dr. Ornstein as evidence that the plate holder class members are vulnerable and disadvantaged members of society. The plaintiffs then claim that the City's regulatory actions and the 2016 By-law have exacerbated that disadvantage. The error in the plaintiffs' position is twofold. First, the statistical data they rely on speaks only to broad demographic trends and not the impact of the City's actions on the plaintiff class members. The statistical data advanced by the plaintiffs may be evidence of the systemic disadvantage felt by visible minority groups in Canadian society, but it says nothing about whether the City's regulatory actions in this case are a manifestation of that systemic disadvantage. Second, while the plate holder class members have co-opted the disadvantage felt broadly by visible minorities, the evidence in the record shows the class members themselves enjoy relative economic advantage. This is especially so when the plate holders are compared with the taxi drivers and Uber drivers who are not parties to this action. These drivers are also visible minorities and come from many of the same countries as the plate holders. However, these drivers have benefitted from the City's regulatory action; Private Transportation Companies ("**PTCs**") like Uber offer the opportunity for new, flexible work options and the introduction of competition into the VFH market has given taxi drivers a better bargaining position when negotiating the fees they pay to plate holders for access to the market.

13. As a result, the plaintiffs have failed to make out their *Charter* claim. The 2016 By-law is constitutional.

14. The plaintiffs have also framed their discrimination argument in the *Ontario Human Rights Code*, but this claim suffers from the same flaws as the *Charter* claim. Moreover, the Ontario Human Rights Tribunal has already considered this issue in the *Addai v. Toronto* case and rejected the claim that amendments to for hire regulations are discriminatory.

15. Finally, the City provided services to the plaintiffs in relation to By-law 2012-258 (the “**2012 By-law**”), which were related to the administration and enforcement of the regulatory regime. The City recouped the costs of those services by charging fees, pursuant to its authority under the *Municipal Act*, 2001 (the “**Municipal Act**”). In doing so, it consistently ensured that the quantum of the fees was roughly equivalent to the cost of providing those services. The plaintiffs suggest that the City is required to carry out a specific costing analysis to justify the fees charged under the 2012 By-law. There is no authority for this claim. The fees charged to the plaintiffs represent a small fraction of the City’s total by-law enforcement budget, a rounding error in the context of its overall budget, and are reasonably tied to the cost of the services that the City provides. They are lawful.

OVERVIEW OF THE FACTS

1) Summary of the Action

A) Parties

16. The City is a municipality incorporated on January 1, 2001, pursuant to the *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sched. E. The City is the regulator that determines the by-laws and policies governing the taxi and PTC industries in the City of Ottawa.¹

17. The Plaintiff, Metro Taxi Ltd. (“**Metro**”), operates under the unregistered business name “Capital Taxi” within the geographic limits of the City of Ottawa. Metro holds a taxi broker license in accordance with the 2016 By-law.²

18. The Plaintiff, Marc André Way (“**Mr. Way**”), is the President, Chief Executive Officer and co-owner of Metro.³ Mr. Way holds standard and accessible taxi plate holder licences in accordance with the provisions of the 2016 By-law.⁴

19. The Plaintiff, Iskhak Mail (“**Mr. Mail**”), is a former plate license holder in the City of Ottawa.⁵

B) The Action

20. Following the enactment of the 2016 By-law, and in response to the City’s actions following the arrival of Uber in Ottawa, the Plaintiffs (Metro and Mr. Way) initiated a claim on August 12, 2016 for damages against the City under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The claim was later amended to include Mr. Mail as a representative plaintiff.⁶

¹ Statement of Agreed Facts at paras. 2 and 5, p. F1.

² Amended Amended Statement of Claim at para. 3, p. A248.

³ Marc André Way, Examination in Chief, January 5, 2023, p. 66, lines 30 – 32.

⁴ Exhibit 1, Tab 131, Plate Holder Renewal Statistics, p. F84;

⁵ *Amended Amended Statement of Claim*, *supra* note 2 at para. 4a, p. A248.

⁶ *Ibid.*

21. On November 23 and 24, 2017, Justice R. Smith of the Ontario Superior Court of Justice heard a motion brought by the Plaintiffs to certify the class proceedings. Upon hearing the parties' arguments, Justice Smith certified two classes:

- (a) 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; [**“the Plate Holder Class”**]; and
- (b) 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 [**“the Broker Class”**]⁷

22. Justice Smith certified the following five (5) common issues to be decided at trial:

- (a) Was the City negligent in enforcing the Taxi By-Law from September 1, 2014 to September 30, 2016? [**“Common Issue 1”**]
- (b) Were the 2016 amendments to the City's Taxi By-law unlawful? [**“Common Issue 2”**]
- (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 section 15 of the *Charter of Rights and Freedoms* or under section 3 of the *Human Rights Code*? [**“Common Issue 3”**]
- (d) Did the fees collected by the City under its Taxi By-Law constitute an unlawful tax? [**“Common Issue 4”**]
- (e) Are damages assessed in the aggregate an appropriate remedy? [**“Common Issue 5”**]⁸

⁷ *Metro Taxi Ltd. v. City of (Ottawa)*, 2018 ONSC 509 at para 57.

⁸ *Ibid* at para. 83.

23. The Plaintiffs have since abandoned their pursuit of Common Issue 2.⁹

24. Between January 4, 2023 and February 16, 2023, Justice Marc Smith of the Ontario Superior Court heard evidence from the parties in relation to Common Issues 1, 3 and 4.

25. On the plaintiffs' motion, Common Issue 5 was adjourned until a second phase of trial, to be heard only in the event that the City is found liable.¹⁰ As a result of this motion, the determination of the plaintiffs' alleged entitlement to damages, including *Charter* damages, will be deferred until the second phase of trial.

26. The plaintiffs claim that this issue was deferred at the City's request.¹¹ This is not accurate. As demonstrated by the plaintiffs' factum filed in support of their motion, the plaintiffs' request contemplated the deferral of a finding on all issues of damages, and a limiting of the Court's ruling to issues of liability.

8. Given the significant delay, the reality is that, as matters currently stand, the trial is not progressing in a way that will ensure that all witnesses are examined and all relevant evidence is addressed in the allotted time. Therefore, it is necessary for this Court to take measures that will ensure that trial efficiency, effectiveness and fairness are achieved in the circumstances of this case. There are two possible options for this Court to do so. The first is to defer the issues that can naturally be dealt with at a future date. In the context of this case, the natural issue that can be deferred to a later date is that relating to damages and aggregate damages, which would include whether it is possible to prove that the City's alleged conduct caused damages in the aggregate...

...

20. It would be unfair to force the class members to wait again merely so that the parties can re-appear before this Court to complete the evidentiary portion of the trial, which will be followed by even more delay while this Court deliberates and issues a decision. This is especially the case when this Court can be provided with the evidence necessary within the allotted time that would allow it to make findings on core and crucial issues in this case: (1) did the City owe a duty of care?; (2) did the City breach the standard of care?; (3) did the City breach the Charter or the Human Rights Code?; and (4) did the City collect unlawful taxes?¹² [*emphasis added*]

⁹ Plaintiffs' Opening Statement, January 4, 2023, p. 30, lines 4 – 11.

¹⁰ Trial Ruling, January 24, 2023, p. 1, line 20 – p. 9, line 5.

¹¹ Plaintiffs' Closing Submissions, dated April 6, 2023 at p. 7, para. 21.

¹² Plaintiffs' Factum, Motion for Deferral, January 19, 2023, paras. 8 and 20, pp. A916 and A922.

27. All issues of damages, including the plaintiffs' entitlement to damages, if any, and whether those damages can be assessed in the aggregate, have been deferred to a second phase of trial, which will only occur if the City is found liable on Common Issues 1, 3 or 4. The issue of quantum of damages will likely be assessed at a third phase. A third phase will only be necessary if the City is liable, and if the plaintiffs are entitled to damages. As such, these submissions focus only on the City's alleged liability.

28. Due to the deferral of damages to the second phase, the City's expert witness on damages, Dr. Barry Prentice, was not called as a witness. The plaintiffs' expert witness on damages, Gregory McEvoy, was called for the limited purpose of providing evidence in relation to the notes from a series of meetings that Mr. McEvoy held with Mr. Way and his associates, which assisted Mr. McEvoy in the preparation of his expert report regarding damages.¹³

2) Ottawa's Taxi Industry

A) The basic structure

29. The City regulates the taxi industry pursuant to its authority under sections 8, 9, 10, 151 and 156 of the *Municipal Act*, which grant the City the authority to pass by-laws with respect to "taxicab" services.¹⁴ The City has used those powers since amalgamation to enact by-laws with respect to taxicab and limousine services.¹⁵ The terms "taxicab" and "taxi" are interchangeable.

30. The City's operative by-law for much of the time period at issue in this claim was By-law 2012-258 (the "**2012 By-law**"), which the City passed on July 11, 2012.¹⁶ However, the basic structure of the taxi industry described below long predated the enactment of the 2012 By-law. The basic structure was continued under the 2016 By-law.

31. Under the 2012 By-law, a taxicab is defined as "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

¹³ Trial Ruling, *supra* note 10, p. 7, lines 8 – 12; Greg McEvoy, Examination in Chief, January 26, 2023, p. 4, lines 21 – 31.

¹⁴ *Municipal Act*, 2001, S.O. 2001, c. 25, ss. 8-10, 151, 156.

¹⁵ Statement of Agreed Facts, *supra* note 1, at para. 4, p. F1.

¹⁶ Exhibit 2, Tab 306, By-law 2012-258, p. F3898.

hire for the purpose of transporting a person...”¹⁷ There are two basic requirements to provide “taxicab” service, defined as the “transportation of a passenger by taxicab”: (1) the driver must possess a taxicab license; and (2) the taxicab vehicle must have a taxi plate.¹⁸

32. A taxicab plate is “the numbered metal plate issued by the City to be affixed to the taxicab.”¹⁹ The City regulates the number of taxis that may operate by issuing a defined number of plates.²⁰ All licenses and plates issued under the 2012 By-law remain property of the City at all times.²¹

33. The City licenses both standard and accessible taxi cabs, which are designated by either a standard plate, or an accessible plate. The primary differences between accessible taxis and standard taxis are that:

- (a) an accessible taxi must be wheelchair accessible, and must give priority to individuals with mobility impairments (though they may operate in the same manner as standard taxis at all other times); and²²
- (b) obtaining a license to drive an accessible taxi requires completion of the Accessible Taxicab Training Course within the preceding two years.²³

34. The 2012 By-law also licenses taxi brokers, defined as “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.”²⁴

¹⁷ Exhibit 2, Tab 306, *supra* note 16 at ss. 1, 3 and 4, pp. F3902 and F3904.

¹⁸ *Ibid.*

¹⁹ Exhibit 2, Tab 306, *supra* note 16 at p. F3902.

²⁰ Statement of Agreed Facts, *supra* note 1, at para 19, p. F3.

²¹ Exhibit 2, Tab 306, *supra* note 16, at s. 121, p. F3947.

²² Exhibit 115, Accessibility Discussion Paper, pp. F3076-77 and F3081.

²³ Exhibit 2, Tab 307, By-law 2016-272, s. 23, p. F3973.

²⁴ Exhibit 2, Tab 306, *supra* note 16, p. F3902.

35. All licenses under the 2012 By-law, and all plates, are issued for renewable one year terms. They may only be renewed in accordance with the requirements of the by-law, which include the payment of a renewal fee intended to defray the City's cost of administering the by-law.

36. Notwithstanding that plates remain property of the City at all times, both standard and accessible plates may be transferred between licensed taxi drivers, provided that the transfer requirements of the by-law are complied with. These include a requirement that the transferee and transferor file an executed copy of the written sale agreement, and affidavits setting out the true consideration exchanged.²⁵ As outlined below in the context of Common Issue 1, the evidence demonstrates that plate license holders routinely reported false transfer values to the City.²⁶

37. In the Statement of Agreed Facts, the parties agree that:

- (a) the nature and quantum of consideration was determined by plate license holder transferor and transferee, without input or oversight of the City; and
- (b) the City's involvement in taxi plate transfers was limited to regulatory oversight of the reported transfer within the scope of the by-law and for the collection of transfer fees payable to the City of Ottawa.²⁷

38. Under this framework, there are two main types of industry participants connected to taxi plates: taxi drivers and taxi plate holders, each with their own subclasses and hierarchies. The role of each of these participants is expanded on in the following section but may be described in summary as follows:

- (a) Taxi drivers – there are two categories of taxi drivers:

²⁵ Exhibit 2, Tab 306, *supra* note 16, at ss. 91 and 92, p. F3935.

²⁶ Ziad Mezher, Examination in Chief, January 18, 2023, p.7, line 7 – p.8, line 4; Yeshitla Dadi, Cross-Examination, January 23, 2023, p. 123, lines 4 – 24; Exhibit 98, Plate Transfer Documents for Antione El-Feghaly, p. F1145; Antoine El-Feghaly, Examination in Chief, January 25 2023, p. 86, lines 7 – 11; Iskhak Mail, Cross-Examination, January 19, 2023, p. 68, line 6 – p. 69, line 2; Iskhak Mail, Read in to the Cross-Examination, January 19, 2023, p. 77, line 3 – 17.

²⁷ Statement of Agreed Facts, *supra* note 1, at paras 21-22, p. F5.

- Drivers who do not hold a plate, and must therefore rent or lease a plate from those that do. Approximately 75% of taxi drivers in the City of Ottawa fall into this category.²⁸ These drivers are not members of the plaintiff class; and
 - Single-plate holding drivers (see below), who are the primary drivers of a taxi, and who also hold the plate affixed to that taxi.²⁹
- (b) Taxi plate holders – those who hold at least one, and often multiple plates, and may or may not drive a taxi. Corporate entities may also hold plates. There are three types of taxi plate holders:
- Single plate-holding (“**SPH**”) drivers: these are individuals who drive a taxi, and who hold the taxi plate affixed to that taxi. They may also rent the “package” of the vehicle and plate to second or third drivers for the time period when the SPH driver is not operating the taxi themselves. The representative plaintiff Mr. Mail, and the plaintiffs’ fact witnesses, Messrs. Dadi, El-Feghaly and Mezher, are examples of SPH drivers;
 - Multi-plate license holders: these are individuals or corporate entities that hold multiple plate licenses. They may or may not drive a taxi, and generally lease or rent any plates that they are not using to taxi drivers. Mr. Way, as well as the dispatch company Coventry Connections (in which he holds an 80% ownership interest) are examples of multi-plate holders;³⁰ and

²⁸ Exhibit 113, Current Regulatory Regime, October 9, 2015, p. F3030; Exhibit 42, Document 8 – Summary of Plate Ownership, March 2016, p. F2978; Exhibit 55, Taxi Economics – Old and New, October 10, 2015, p. F3097.

²⁹ Exhibit 113, *supra* note 28, at pp. F3030-31.

³⁰ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30 at p. 61, line 29 – p. 62, line 4.

- Absentee plate holders: an absentee plate holder is any single-plate holder that does not operate their vehicle, and instead leases their plate to a plate lessee.³¹

39. In addition to drivers and plate holders, there are two further categories of participants in relation to the dispatch of taxicabs: taxi brokers and dispatchers. Again these categories are expanded upon in the following section but may be summarized as follows:

- (a) Taxi brokers – companies that establish the various “roof signs” or “banners” under which taxicabs operate, and play a managerial role vis-a-vis drivers. There are three taxi broker plaintiffs: Blue Line Taxi (“**Blue Line**”), Westway Taxi (“**Westway**”), and Metro (which operates as Capital Taxi). Mr. Way is the President, CEO, and 50% shareholder of Metro.³² Approximately 98% of all taxi plates in Ottawa are associated with one of these “banners.”³³ As will be discussed below, lessee drivers and SPH drivers are associated with a particular broke and pay the broker “stand rent,” in exchange for which they receive dispatch services and the right to use taxi stands maintained by that broker.³⁴
- (b) Dispatchers – traditionally, brokers provided their own dispatching and cashiering services to drivers. That is no longer the case. Today, Coventry Connections is the sole dispatch service for the City of Ottawa. It provides centralized cashiering, dispatching, technology, and marketing services for each of Blue Line, Westway and Metro,³⁵ which collectively have approximately 98% of all taxis in the City of Ottawa operating under one of their respective banners.³⁶ Mr. Way is the President, CEO, and 80% owner of Coventry Connections.³⁷ Coventry Connections has no competition in the City of Ottawa.

³¹ Marc André Way, Cross-Examination, January 12, 2023, p. 2, line 30 – p. 3, line 8.

³² Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 56, line 26 – p. 57, line 2.

³³ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 111, line 22 – p. 112, line 7.

³⁴ Exhibit 113, *supra* note 28, at p. F3030.

³⁵ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 110, lines 19 – 26.

³⁶ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 111, line 22 – p. 112, line 7.

³⁷ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 61, line 29 – p. 62, line 4.

40. The manner in which these various parties interact can be seen in the steps involved when a passenger calls a taxicab:

- (a) The Call - the passenger makes a call to their preferred taxi, known through its banner – Blue Line, Westway or Capital (Metro);
- (b) The Answer - the call is answered by Coventry Connections, either by live operator or computer software, on behalf of the banner called by the passenger;
- (c) Dispatch and Offer - whether booked by live operator or computer, the call is entered into the dispatch system and offered to the drivers operating for the selected banner, either to: (1) the closest driver; or (2) the taxis registered in the queue of waiting drivers for the dispatch zone;
- (d) Pickup -eventually, a vehicle will arrive. The vehicle must be a taxicab affixed with a plate held by a licensed plate holder, and driven by a licensed taxicab driver;
- (e) Payment - the trip is charged according to the meter rate set by the City, plus extra charges where relevant. If credit or debit card payment is used, the passenger is charged an extra \$1.50 for use of the payment terminal.³⁸

B) Collective bargaining

41. Ottawa is in a minority of cities in which taxi drivers are unionized. Ottawa's drivers are members of Unifor, Local 1688 ("**Unifor**"). As of September 2014, when Uber arrived in Ottawa, Unifor had four bargaining groups: one for each of Blue Line, Westway, Capital, and the airport.

42. Taxis associated with the airport were unique in that they paid a monthly fee in exchange for the exclusive privilege to pick up passengers from the Ottawa airport, which was considered to be more lucrative than standard taxi work. In or around August, 2015, the airport authority entered into a new

³⁸ Exhibit 113, *supra* note 28, at pp. F3035-37.

contract with Coventry Connections that would change this model from a monthly flat fee to a per-trip fee of \$4.50.³⁹ The bargaining unit for airport taxis subsequently went on strike, resulting in “some violence” and extensive disruptions at the airport.⁴⁰ Ultimately, Coventry Connections “broke the union,”⁴¹ and the airport bargaining group was dissolved. Its fleet of cars was blended into the fleets of Blue Line and Capital, beginning in 2016.⁴²

43. As of the arrival of Uber in Ottawa and to date, there are three bargaining groups: one each for Blue Line, Westway, and Capital. All taxi drivers, including all SPH drivers, are members of Unifor, and specifically are members of one of the three bargaining groups. These drivers must pay union dues. Every multi-plate holder is associated with one of the three banners.⁴³

44. Each of these bargaining groups have, from time to time, entered into collective bargaining agreements (“**CBA**”) with the multi-plate holders under their respective banners. The City has no involvement in these CBAs. In the Statement of Agreed Facts, the parties agree that:

9. Beginning as early as 1980 and continuing to date, there have been collective bargaining agreements [“CBAs”] in place between Fleet Owners, such as Capital Taxi and Blue Line Taxi, and unions representing taxi drivers.

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

11. The City has no role in overseeing or enforcing the terms of these CBAs.⁴⁴

45. According to Mr. Way, the purpose of the CBAs is to “crystallize the rules and regulations under which we operate”. These agreements have a wide scope, and govern matters including:

³⁹ Marc André Way, Examination in Chief, January 6, 2023, p. 97, line 3 – p. 98, line 9; Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 70, lines 15 – 25.

⁴⁰ Marc André Way, Examination in Chief, January 6, 2023, *supra* note 39, at p. 97, line 3 – p. 98, line 9; Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 70, lines 15 – 25.

⁴¹ Exhibit 102, Cohen Hamilton Steger Meeting Notes, September 25, 2018, p. B-1-6350.

⁴² Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 44, lines 3 – 7.

⁴³ Exhibit 113, *supra* note 28, at p. F3031; Marc André Way, Examination in Chief, January 5, 2023, p. 101, lines 2 – 15.

⁴⁴ Statement of Agreed Facts, *supra* note 1, at paras 9-11, p. F2.

- (a) The amount of stand rent to be paid by drivers
- (b) The amount of rent that a multi-plate holder may charge for the privilege of using a taxi plate held by the multi-plate holder;
- (c) The daily rent that may be charged to drivers who rent both a plate and a vehicle;
- (d) The rules governing seniority and entitlement to vacation time;
- (e) The process under which a multi-plate holder may sell their plate;
- (f) The processes for succession of leaseholding, and compensation for displaced leaseholders; and
- (g) The administrative charges payable to the company in the event that a plate or lease is sold.⁴⁵

46. Absentee plate holders are not bound by the CBA, and may enter into their own commercial arrangements for lease or rental of a plate.⁴⁶ Similarly, SPH drivers who wish to lease their plate are not bound by the restrictions on plate rent set out in the CBA. As a result, leaseholders of rent-controlled leases governed by the CBA may “sell” the rights to that lease for significant consideration.⁴⁷

C) Ottawa’s taxi hierarchy

47. The Ottawa taxi industry is organized in a hierarchical manner: wealth and influence become ever more concentrated as one moves up the pyramid. The plaintiffs represent the upper levels of the pyramid, and exclusively represent the ownership class of the taxi industry. Indeed, the representative plaintiff Mr. Way has achieved a concentration of wealth and influence within the taxi industry that is singular and unique.

⁴⁵ Exhibit 113, *supra* note 28, at p. F3031; Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 101, lines 2 – 15; Exhibit 1, Tab 9: Capital Taxi CBA Jan. 14, 2016 – Jan 13, 2019, pp. F5323 – F5326.

⁴⁶ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 29, line 21 – p. 30, line 16.

⁴⁷ Exhibit 113, *supra* note 28, at p. F3031; Exhibit 55, *supra* note 28, at p. F3117, note 22.

48. Mr. Way is the President and 50% shareholder in Metro/Capital. He holds 89 plates personally, and holds a further ten through a wholly-owned corporate entity.⁴⁸ These 99 plates represent 8.3% of all plates in the City of Ottawa. Mr. Way also holds an 80% share in Coventry Connections, which is the only dispatcher in the City, and which itself holds a further 5.3% of all plates in the City.⁴⁹

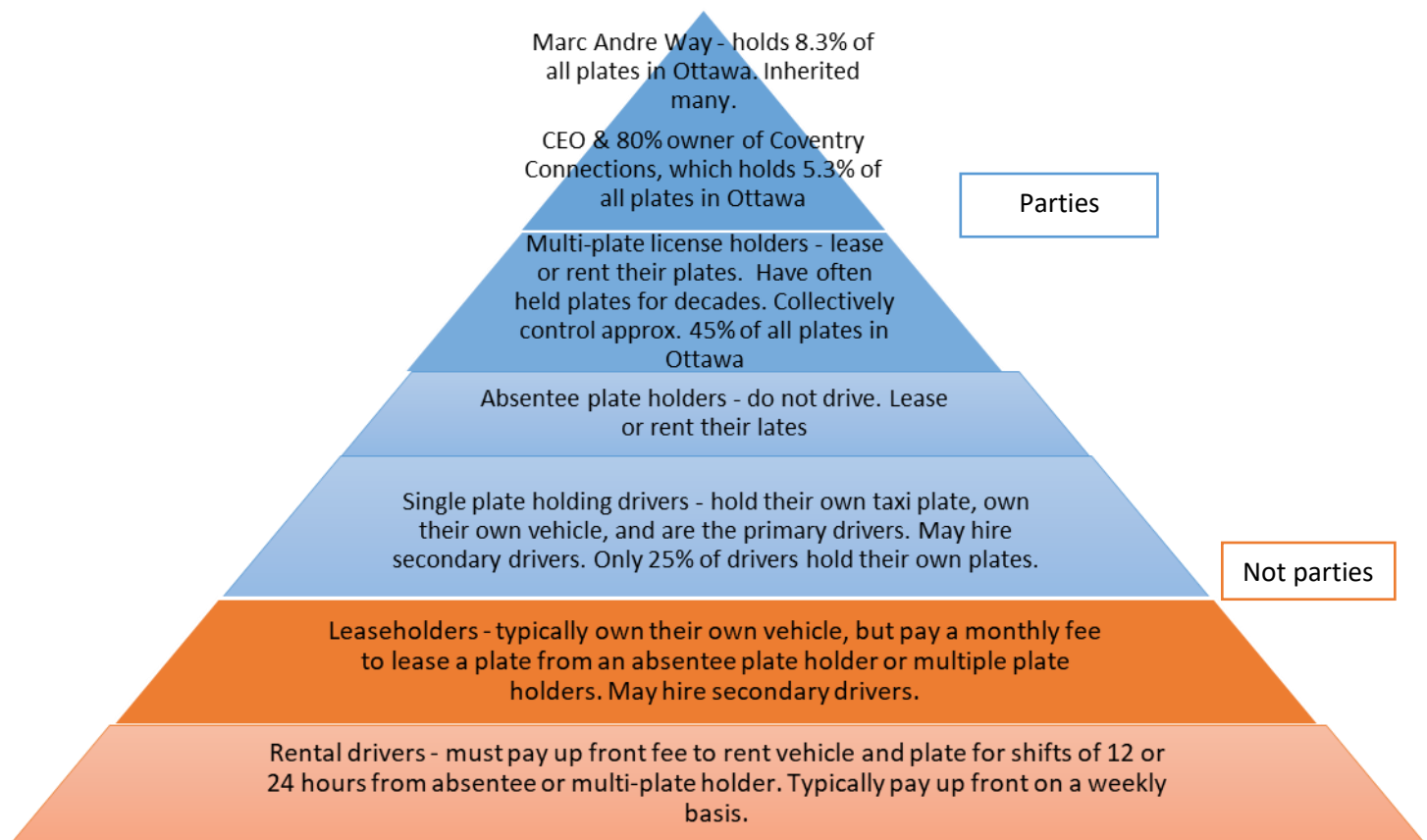
49. There are approximately 2,600 licensed taxi drivers in Ottawa, and only 644 of those drivers are SPH drivers.⁵⁰ The vast remainder – approximately 75% - do not hold taxi plates, and must therefore pay members of the plaintiff class for the privilege of using the plates they hold. Those 75% of drivers are not parties to this claim.

50. The following graphic provides an illustration of the hierarchy of the Ottawa taxi industry:

⁴⁸ Exhibit 1, Tab 131, *supra* note 4, p. F84; Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, p. 114, lines 15 – 25.

⁴⁹ *Ibid.*

⁵⁰ Exhibit 113, *supra* note 28, at p. F3030; Exhibit 42, *supra* note 28, at p. F2978; Exhibit 55, *supra* note 28, at p. F3097.



I) Drivers and plate holders

(1) Rental drivers

51. At the bottom of the hierarchy are rental drivers. These are licensed taxi drivers who do not hold plates, and must therefore pay for the privilege of using a plate held by another person or corporate entity. Rental drivers will either rent as a part-time, secondary or third driver to the primary driver of the taxi (be it a leaseholder or a SPH driver), or they may rent from multiple or absentee plate holders.⁵¹

52. These drivers will rent a “package” including access to the taxi vehicle and plate, maintenance, insurance, and the required equipment from a plate holder in exchange for a fixed fee.⁵² The driver is responsible for paying for fuel, and is entitled to keep all revenue from a shift over and above the fixed rental price.⁵³ Rental drivers typically rent for either 12 or 24 hour shifts, and the rental fee must be

⁵¹ Exhibit 113, *supra* note 28, at p. F3031.

⁵² Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 10, line 29 – p. 11, line 1.

⁵³ *Ibid.*

paid up-front. If a driver is going to rent on a weekly basis, they will typically pay for six days, and receive the seventh free.⁵⁴

53. Only multi-plate holders are bound by the rental fees set out in the CBA. If a rental driver is renting from a plate lessee or single plate holder, then the rental rate is set by direct negotiation between the parties, without recourse to the CBA.⁵⁵

54. Accessible taxicabs generally command a higher rental rate when they are working under contract for Para Transpo.⁵⁶ This is discussed in greater detail below in the context of the VFH review. The rental rates are set out in the relevant CBA as follows:

		Standard Vehicle			Accessible Vehicle		
		Year 1	Year 2	Year 3	Year 1	Year 2	Year 3
Capital CBA Jan. 14, 2016 – Jan. 13, 2019 ⁵⁷	12 hour rental	\$70.00	\$70.00	\$70.00	\$89.00	\$89.00	\$89.00
	24 hour rental	\$95.00	\$95.00	\$95.00	\$115.00	\$115.00	\$115.00
Blue Line CBA, Nov. 29, 2017 – Nov.28, 2020. ⁵⁸	12 hour rental	\$60.00	\$60.00	\$60.00	n/a	n/a	n/a
	24 hour rental	\$95.00	\$95.00	\$95.00	\$100.00	\$100.00	\$100.00 ⁵⁹
Westway CBA, Oct. 10, 2012 – Oct. 9, 2015. ⁶⁰	12 hour rental	\$70.00	\$71.40	\$72.83	n/a	n/a	n/a
	24 hour rental	\$95.00	\$96.90	\$98.84	n/a	n/a	n/a

⁵⁴ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 4, line 27 – p. 10, line 4.

⁵⁵ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 25, line 13 – 32.

⁵⁶ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 8, line 20 – p. 9, line 15

⁵⁷ Exhibit 1, Tab 9, *supra* note 45, at p. F5331

⁵⁸ Exhibit 1, Tab 26, Blueline CBA 2017 – 2020, p. F6005.

⁵⁹ The rate set out in this CBA is \$100.00 per 24 hour rental for an accessible van on contract to Para Transpo, and \$95.00 per 24 hour rental for an accessible van not on contract to Para Transpo.

⁶⁰ Exhibit 1, Tab 3, Westway CBA 2012-2015, p. F4948.

(2) Plate lessees

55. The next tier up from the bottom of the hierarchy are lessee drivers, who pay a monthly fee to lease their plate from a member of the plaintiff class – typically a multi-plate holder, though occasionally an absentee plate holder. The expenses of a lessee include: (1) Monthly “plate rent” paid to the plate holder, in an amount that is typically fixed by the CBA, and which must be paid regardless of whether the lessee is operating the taxi. Plate rent entitles the lessee to use of the plate;⁶¹ (2) “Stand rent” paid to the broker with which they are associated – either Capital, Blue Line or Westway – in an amount also fixed by the CBA, and which is paid in return for the broker providing services including cashiering and dispatch, and entitles the driver to use taxi stands operated by that broker. Stand rent must also be paid whether or not the lessee is operating their taxi;⁶² (3) Finally, a lessee must also pay for their own insurance, maintenance and fuel.⁶³

56. The fixed costs of plate lessees for plate rent and stand rent are set out in the various CBAs as follows:

		Year 1	Year 2	Year 3
Capital CBA January 14, 2016 – January 13, 2019 ⁶⁴	Plate rent	\$750.00	\$782.00	\$785.00
	Stand rent	\$425.00	\$445.00	\$455.00
Blue Line CBA, November 29, 2017 – November 28, 2020. ⁶⁵	Plate rent	\$750.00	\$750.00	\$750.00
	Stand rent	\$397.00	\$397.00	\$397.00
Westway CBA, October 10, 2012 – October 9, 2015. ⁶⁶	Plate rent	\$730.00	\$740.00	\$750.00
	Stand rent	\$435.00	\$445.00	\$455.00

⁶¹ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 21, lines 7 – 26.

⁶² Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 12, lines 14 – 18.

⁶³ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 21, lines 22 – 26.

⁶⁴ Exhibit 1, Tab 9, *supra* note 45, at p. F5331

⁶⁵ Exhibit 1, Tab 26, *supra* note 59, at p. F6005.

⁶⁶ Exhibit 1, Tab 3, *supra* note 60, at p. F4948.

57. Additionally, absentee plate holders or SPH drivers that do not wish to drive may lease out their plates and will not be bound by the CBAs. In its Policy Options paper, commissioned as part of the VFH Review, KPMG found that lessee drivers reported paying monthly rental fees of up to \$1,500.⁶⁷ Lessees may hire secondary shift drivers, in order to help defray their costs. However, they have also frequently complained that the high cost of plate leasing does not contribute any positive good to the taxi industry. By way of example, in the Policy Options paper, KPMG found that some plate lessees “expressed the feeling that these costs contribute little or nothing to the industry, ultimately leading to lower income for taxicab drivers.”⁶⁸

58. Collectively, rental drivers and plate lessees constitute 75% of all licensed taxi drivers in Ottawa. These drivers are not parties to this claim.⁶⁹

(3) SPH drivers

59. Despite characterizing the taxi industry as the “poor man’s industry,” the plaintiffs exclusively represent the ownership class of the industry.⁷⁰ SPH drivers are the first tier of the ownership class.

60. SPH drivers must pay stand rent to the broker with which they are associated, and must pay for their own maintenance, insurance and fuel, as well as for union dues. They are entitled to retain all other monies collected beyond these fixed costs (other than a car payment, if one exists).⁷¹

61. SPH drivers may rent their plate to secondary or third drivers, and will not be bound by the CBA if they do so.⁷²

⁶⁷ Exhibit 56, Policy Options Paper, November 18, 2015, pp. F3162-63.

⁶⁸ *Ibid.*

⁶⁹ Exhibit 113, *supra* note 28, at p. F3030; Exhibit 42, *supra* note 28, at p. F2978; Exhibit 55, *supra* note 28, at p. F3097.

⁷⁰ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para 43.

⁷¹ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 25, lines 1 – 7.

⁷² Exhibit 56, *supra* note 67, at pp. F3162-63.

(4) Absentee plate holders

62. The next tier of the ownership class is absentee plate holders. An absentee plate holder is any single-plate holder that does not operate their vehicle, and instead leases their plate to a plate lessee.⁷³ The absentee plate holder may have retired, or left Ottawa, or may, like Mr. Dadi, be seeking to lease their plate as a guaranteed source of income in retirement.⁷⁴ It is unknown how many absentee plate owners exist in comparison with the number of SPH drivers, though it was Mr. Way's evidence that "most" single plate holders operate their own plates.⁷⁵

63. Absentee plate holders negotiate the terms of their lease directly with the plate lessee, and are not bound by the terms of the CBA.⁷⁶ Absentee plate owners generally do not have fixed costs, as the lessee will be responsible for paying for stand rent, plate rent, maintenance, insurance, and fuel.⁷⁷

(5) Multi-plate holders

64. Multi-plate holders are individuals or corporate entities that have amassed multiple plates, and either rent or lease their plates to others. Multi-plate holders generally do not have fixed expenses, and their revenue is determined solely by the rental charges – either through leases or daily rentals, that the multi-plate holder can collect.⁷⁸ The rental rates of multi-plate holders are established by the relevant CBAs.

65. Based on the evidence set out above, the following chart sets out the fixed expenses and revenue streams of the various tiers of the industry in Ottawa's taxi hierarchy:

⁷³ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 2, line 30 – p. 3, line 8.

⁷⁴ Yeshitla Dadi, Cross-examination, January 23, 2023, *supra* note 26, at p. 122, lines 7-12.

⁷⁵ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 3, lines 9 -11.

⁷⁶ Exhibit 56, *supra* note 67, p. F3162-63.

⁷⁷ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 21, lines 22-26.

⁷⁸ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 26, lines 19-25.

	Hold plate license?	Operate taxi?	Fixed Costs	Revenue
Rental driver	No	Yes	<ul style="list-style-type: none"> - Rental fee (fixed if renting from multi-plate; not fixed if renting from lessee, or SPH drivers) - Fuel - Union dues 	<ul style="list-style-type: none"> - All monies collected after fixed fee, minus fuel and union dues
Plate lessee	No	Yes	<ul style="list-style-type: none"> - Stand rent - Plate rent (fixed if renting from multi-plate owner, not fixed if renting from absentee plate holders) - Maintenance - Insurance - Fuel - Union dues 	<ul style="list-style-type: none"> - All monies collected after fixed expenses - Potential to rent to secondary driver (rental amount fixed)
SPH driver	Yes	Yes	<ul style="list-style-type: none"> - Stand rent - Maintenance - Insurance - Fuel - Union dues 	<ul style="list-style-type: none"> - All monies collected after fixed expenses - Potential to rent to secondary driver (rental amount not fixed by CBA)
Absentee plate holder	Yes	No	N/A	<ul style="list-style-type: none"> - Plate rent from lease of plate (amount not fixed by CBA)
Multi-plate holder	Yes	No	N/A	<ul style="list-style-type: none"> - Plate rent (amount fixed by CBA) - Daily rental (amount fixed by CBA)

(6) Concentration of ownership amongst generations of multi-plate holders

66. In Ottawa, there is a high degree of concentration of plate holding amongst multi-plate holders. As of March 2016, multi-plate holders held approximately 45% of all taxi plates in Ottawa.⁷⁹ Although this multi-plate holder group does include some holders of two or three plates, the vast majority of the consolidation is focused in a small number of hands.

67. As of March 2016, there were a total of 755 different plate holders in Ottawa, holding a total of 1,188 plates. The eight largest plate holders – representing just over 1% of the ownership population – collectively held approximately 25% of all plates.⁸⁰

68. Much of this ownership is associated with the ownership of taxi brokerages. By way of example:

- (a) As of 2022, the Szirtes family, who own the plaintiff broker Westway, collectively held 70 plates – approximately 5.9% of the total plates in circulation;⁸¹
- (b) Coventry Connections, which owns the plaintiff broker Blue Line,⁸² and which provides dispatch services to Westway, Blue Line and Capital, held 63 plates in 2022 – approximately 5.3% of all plates in circulation;⁸³ and
- (c) Mr. Way, who is the President and 50% owner of Capital, and is the President, CEO, and 80% owner of Coventry, held 99 plates in 2022 – approximately 8.3% of all plates in circulation.⁸⁴

⁷⁹ Exhibit 42, *supra* note 28, at p. F2978; Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 26, line 31 – p. 27, line 2.

⁸⁰ Exhibit 42, *supra* note 28, at p. F2978.

⁸¹ Exhibit 1, Tab 131, *supra* note 4, at p. F84.

⁸² Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 69, lines 2-3.

⁸³ Exhibit 1, Tab 131, *supra* note 4 p. F84

⁸⁴ *Ibid.*; Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, p. 114, lines 15 – 25.

69. Indeed, Mr. Way holds or controls the single greatest concentration of taxi plates in the City. Between those that he holds personally, and those that are held by Coventry, Mr. Way controls approximately 13.6% of all plates in the City of Ottawa.

70. The bulk of this consolidation of ownership occurred prior to amalgamation, when the value of taxi plates on the secondary market was significantly lower. By way of example, Metro Taxi's financial statements for 2011 list an accumulated cost of \$455,957 for all of its taxi plates. At the time, Metro held 87 plates, for an average cost of \$5,240.89 per plate.⁸⁵ When confronted with this calculation, Mr. Way's explanation was that Metro had been acquiring plates for many years:

Q. And we see that the taxi plates, as of 2011, this would be the accumulated cost of the taxi plates, were \$455,957?

A. Yes.

Q. All right. And at that time, you had 87 plates?

A. Yes.

Q. So on average, and you'll have to trust my math, \$5,240.89 was the average cost per plate?

A. You, you must recognize that we've been doing this since — for many, many, many years.

Q. I'm just asking you, sir, the average cost per plate.

A. Yes.

Q. All right.

A. If you, if you look at it that way. Yeah.⁸⁶ [*emphasis added*]

71. This accords with Mr. Way's earlier evidence that prior to amalgamation, Capital Taxi's business strategy in Vanier was to "remain the dominant company," and to apply for a plate whenever one was issued to Capital's competitors.⁸⁷

⁸⁵ Exhibit 1, Tab 63, Metro Taxi Financial Statements (2011-2018), p. F7548.

⁸⁶ Marc André Way, Cross-Examination, January 13, 2023, p. 19, line 20 – p. 20, line 3.

⁸⁷ Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 36, lines 27-32.

72. The plaintiffs describe the plate holders of today who hold large numbers of plates, like Mr. Way, Coventry, and the Szirtes family as “yesterday’s underdogs.”⁸⁸ These plate holders were never “underdogs.”

73. There is no evidence that today’s large concentrated plate holders ever faced any obstacles or discrimination. To the contrary, both Mr. Way and the Szirtes family represent third and second generations, respectively, of highly successful family enterprises. While it is possible that the creators of these enterprises faced obstacles (although the Court only heard hearsay evidence on that front), today’s “taxi captains” were never themselves underdogs. They were handed the keys to enterprises that were successful long before they were tall enough to see over the steering wheel.

II) Brokers and Coventry Connections

74. Traditionally, brokers would provide cashiering, marketing, and dispatch services. These services are now provided to the three plaintiff brokers by Coventry Connections, pursuant to a service agreement.⁸⁹

75. The brokers collect stand rent from the plates associated with their banner, though this stand rent is remitted to Coventry Connections.⁹⁰ The stand rent is collected and remitted, whether or not the taxi is operating.⁹¹ In exchange for the stand rent, taxis associated with the banner receive dispatch and cashiering services from Coventry, and are permitted to use taxi stands associated with the banner.

76. Brokers also collect fees for credit card transactions, administrative fees on chits, and administrative fees on charge accounts with entities such as large corporations or the Government of Canada.⁹² Finally, brokers collect administrative fees to process the transfer of leases or licenses. These are set out in the CBAs, and include the following:

⁸⁸ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at p. 15, heading 1.

⁸⁹ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 111, lines 22 – 24

⁹⁰ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 15, lines 20 – 23.

⁹¹ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 12 lines 13 – 15.

⁹² Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 31 lines 19 – 23.

- (a) In its 2012-2015 CBA, Westway charged \$4,000 as an administrative fee to process a lease transfer;⁹³
- (b) In its 2016-2019 CBA, Capital charged a \$3,000 consulting fee to any driver that wished to take over an available plate lease;⁹⁴ and
- (c) In its 2017-2020 CBA, Blue Line charged an administrative fee of \$750 to process a lease transfer.⁹⁵

77. In addition to serving as the only dispatch service in the City, Coventry Connections is a major voice for the taxi industry in the halls of power. As outlined below, during the Vehicle-for-Hire Regulatory Review, Coventry met with KPMG and City staff on numerous occasions. It also hired its own lobbyist, in order to influence the course of the Review.

3) The history of taxi regulation in Ottawa

78. The history of taxi regulation in Ottawa is set out at length in the context of Common Issue One, and will therefore only be addressed in a summary fashion here.

79. The current City of Ottawa (the “**Current City**” or, the “**City**”) came into being on January 1, 2001, pursuant to the *City of Ottawa Act, 1999*. It was an amalgamation of the following municipalities:

1. The Regional Municipality of Ottawa-Carleton [*the “**RMOC**”*]
2. The City of Cumberland.
3. The City of Gloucester.
4. The Township of Goulbourn.
5. The City of Kanata.

⁹³ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 23, lines 19 – 31; Exhibit 1, Tab 3, *supra* note 60, at p. F4982.

⁹⁴ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 24, lines 5 – 15.

⁹⁵ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 23, lines 13 – 18.

6. The City of Nepean.
7. The Township of Osgoode.
8. The City of Ottawa.
9. The Township of Rideau.
10. The Village of Rockcliffe Park.
11. The City of Vanier.
12. The Township of West Carleton.⁹⁶

80. Prior to amalgamation, the former City of Ottawa (the “**Former City**”) regulated the taxi industry through taxi by-laws passed from time to time. In addition, the former cities of Cumberland, Gloucester, Kanata, Nepean and Vanier (collectively, the “**Predecessor Cities**”) all regulated the taxi industry through their own taxi by-laws.⁹⁷ These by-laws were enacted at least as early as 1973, and up to December 31, 2000. The remaining constituent municipalities did not regulate the taxi industry, as they were largely small, rural, and isolated.

81. By the eve of amalgamation, the taxi by-laws of the Former City and the Predecessor Cities contained a number of standard provisions, which had first been enacted by the Former City as early as 1969, and which are detailed below under Common Issue 1.⁹⁸

82. After amalgamation, the taxicab by-laws that had been adopted in the Former City and the Predecessor Cities initially remained in effect, though subject to occasional amendment, as the City embarked on the process of developing as new harmonized taxicab by-law.

⁹⁶ *City of Ottawa Act, 1999, S.O. 1999, c. 14, Sched. E., s. 5(1)*.

⁹⁷ Statement of Agreed Facts, *supra* note 1, at para 14, p. F3.

⁹⁸ Exhibit 2, Tab 309, By-law L1, p. F4060 and F 4080; Exhibit 2, Tab 329, By-law L6, pp. 4692 and F4731; Exhibit 34, Taxi Project Team Report, December 5, 2000, p. F2149; Exhibit 2, Tab 320, Gloucester By-law 1 of 1984, ss. 39(1) and (2), p. F4491; Exhibit 2, Tab 315, Gloucester By-law 41 of 1998, s. 13(3), p. F4292; Exhibit 2, Tab 316, City of Cumberland By-law 56-99, s. 29(1), p. F4348; Exhibit 2, Tab 310, City of Vanier Taxi By-law 33 of 1994, s. 25(1), p. F4156; Exhibit 2, Tab 318, City of Vanier Taxi By-law 34-00, s. 25(1), p. F4389; Exhibit 2, Tab 322: City of Kanata By-law 3-82, s. 32(f), p. F4526; Exhibit 2, Tab 314: City of Kanata By-law 120-97, s. 21(1), p. F4268; Exhibit 2, Tab 326, Nepean By-law 28-67, ss. 15(c) and 16, p. F4457; Exhibit 2, Tab 317, Nepean By-law 115-2000, s. 21(1), p. F4379; Exhibit 2, Tab 330, Former City of Ottawa By-law L6, ss. 26(1) and (2), p. F4771.

83. The City ultimately adopted its first harmonized taxicab by-law on November 5, 2005, in the form of By-law 2005-451 (the “**2005 By-law**”). The by-law, which came into force on January 1, 2006, generally maintained the features of the taxicab regulatory regime that were already in place, including the provision retaining ownership of taxi plates with the City at all times.

84. The 2005 By-law remained in place until it was re-enacted with minor amendments in the form of the 2012 By-law. This was the by-law in place when Uber began operating in Ottawa in September, 2014.

85. As will be outlined below, the evidence is clear that both before and after amalgamation, taxicab regulatory regimes were enacted to promote the fundamental municipal purposes of public safety and consumer protection. Regulations were put in place to further those purposes, rather than to promote or protect the financial interests of plate license holders.

4) The vehicle for hire regulatory review

A) Overview

86. The facts underlying the City’s adoption of the 2016 By-law are set out in detail in the following section. However, the facts of that process (the “**VFH Review**”) are uncontroverted and are presented below in summary:

- (a) On May 1, 2015, approximately eight months after Uber began operating in Ottawa, City staff delivered a report to the Community and Protective Services Committee (“**CPSC**”) and Council recommending that the City retain a consultant to undertake a comprehensive review of the City’s taxi and limousine regulations. The proposed review would include recommendations regarding potential regulations to recognize the emergence of new ride hailing technologies and transportation-for-a-fee service models.⁹⁹

⁹⁹ Exhibit 53, Report to CPSC, May 1, 2015, p. F2656-7.

- (b) City Council approved the proposed comprehensive review on May 27, 2015.¹⁰⁰ On July 9, 2015, the City issued a Request for Proposals (the “RFP”) from qualified consultants to undertake the review.¹⁰¹
- (c) Through the RFP process, the City retained KPMG along with its subcontractors Hara Associates, the Mowat Centre, and Core Strategies to undertake the comprehensive review.¹⁰²
- (d) Between late August 2015 and December 31, 2016, KPMG and its subcontractors engaged in a process of research, consultation and analysis including the following elements:
- Research and publication of six discussion papers, throughout October 2015 on a variety of research topics mandated by the RFP;¹⁰³
 - Seven workshops held with stakeholders from the taxi industry and Uber drivers, as well as members of the public;¹⁰⁴
 - Beyond the seven workshops, KPMG held additional meetings with stakeholders in the VFH industry including: Mr. Way; Coventry Connections; Unifor, the three plaintiff brokers, Blue Line, Metro and Westway; and Uber; ¹⁰⁵
 - Receipt of approximately 6,000 submissions from members of the public, submitted through a dedicated online portal and dedicated telephone hotline established by the City;¹⁰⁶

¹⁰⁰ Exhibit 109, Minutes of Ottawa City Council May 27, 2015 p. F115.

¹⁰¹ Exhibit 110, Request for Proposals, July 9, 2015, p. F1054.

¹⁰² Exhibit 111, Memo from Susan Jones to Council, August 26, 2015, p. B-1-7867; Leslie Donnelly, Examination in Chief, January 26 2023, pp. 80, line 22 to p. 82, line 16.

¹⁰³ Exhibit 59, Report to CPSC, March 31, 2016, pp. F2775-6.

¹⁰⁴ *Ibid.*

¹⁰⁵ Brian Bourns, Examination in Chief, January 31, 2023, p. 25, line 30 – p. 26, line 14.

¹⁰⁶ Exhibit 59, *supra* note 103, at p. F2776.

- The development and publication of a Policy Options Paper on November 28, 2015, which set out three broad and nonexclusive models for regulatory reform. One of those models involved the establishment of a new licensing category for app-based service models (“**ABSMs**,” which the City would ultimately term Private Transportation Companies, “**PTCs**”) such as Uber;¹⁰⁷
 - Two subsequent webinars open to all members of the public;¹⁰⁸ and
 - KPMG’s development of a Final Report dated December 31, 2015 (the “**KPMG Final Report**”), which contained approximately 70 specific recommendations for reforms to the City’s VFH by-laws. In broad terms, KPMG recommended both the establishment of a new licensing category for PTCs; and some simplification of the existing regulations for the taxi industry.¹⁰⁹
- (e) On March 31, 2016, Staff delivered a report to CPSC and Council (the “**2016 Staff Report**”) recommending amendments to the 2012 By-law. The overarching direction of the amendments would: (1) establish a new business licensing category for PTCs; and (2) maintain the bulk of the existing regulatory regime governing the taxi industry, with some simplification of regulations. The report appended all the discussion papers produced by KPMG and its subcontractors through their review process, including KPMG’s Final Report. The Final Report was first released to the public on this date.¹¹⁰
- (f) On April 7 and 8, 2016, CPSC held a special meeting to consider the 2016 Staff Report. At this meeting, CPSC heard delegations from numerous members of the VFH industry, including: Mr. Way; Richard Szirtes, the President of the plaintiff Westway; the President and Legal counsel for Unifor; various taxi drivers; and representatives of Uber. At the

¹⁰⁷ *Ibid.*; Exhibit 56, *supra* note 67, at p. F3140.

¹⁰⁸ Exhibit 59, *supra* note 103, at p. F2776.

¹⁰⁹ *Ibid.*; Exhibit 58, KPMG Report, December 31, 2015.

¹¹⁰ Exhibit 59, *supra* note 103, at p. F2764.

close of the meeting, CPSC voted to recommend adoption of the 2016 Staff Report, subject to a number of motions amending some of the recommendations. One of these motions recommended delaying the implementation of the amendments from June 30, 2016 until September 30, 2016, at the request of the taxi industry.¹¹¹ This motion to delay the implementation of the amendments was adopted.

- (g) Throughout the review process, City staff held numerous direct meetings with stakeholders in addition to those meetings held by KPMG. City staff met with stakeholders including plate license holders, taxi brokers, Unifor, representatives of the accessibility community, and representatives of Uber.¹¹²
- (h) On April 13, 2016, City Council voted to adopt CPSC's recommendations.¹¹³ These recommendations ultimately formed the basis of the 2016 By-law, which came into force on September 30, 2016.
- (i) Throughout the entirety of the review process, the main stakeholders engaged in extensive lobbying efforts. The City of Ottawa's Lobbyist Registry documents that between May 2015 and April 2016, lobbyists retained by each of Coventry Connections, Unifor and Uber met and communicated with City staff and councillors on dozens of occasions to lobby with respect to the City's development of new VFH regulations.¹¹⁴

¹¹¹ Exhibit 61, Minutes of CPSC Meeting, April 7-8, 2016, pp. F527-F528 and F531.

¹¹² Susan Jones, Examination in Chief, February 8, 2023, p. 72.

¹¹³ Statement of Agreed Facts, *supra* note 1, at paras. 32-34, p. F7; Exhibit 123, Council Meeting Minutes 29, April 13, 2016, pp. F3703-3734.

¹¹⁴ Exhibit 1, Tab 62, City of Ottawa Lobbyist Registry, pp. F7527 – F7542; Exhibit 1, Tab 132, City of Ottawa Lobbyist Registry, pp. F7908-F7944.

B) The context for the plaintiffs claims that the City ignored plate value

1) The plaintiffs' claims mirror the claims raised in Unifor

87. The plaintiffs claim that in enacting the 2016 By-law, the City deliberately ignored both equity concerns and the potential impact of the proposed amendments on plate value.¹¹⁵ Both claims are incorrect. Throughout the VFH Review, members and representatives of the taxi industry generally, and of the plaintiff class specifically, were consulted extensively by both the City and its consultants. The concerns articulated by the taxi industry were directly addressed in the various studies and reports that were published through the process. The manner in which the City addressed equity concerns is outlined in Common Issue 3, while this section details the City's consideration of the impact of the 2016 By-law on plate values.

88. For the reasons set out below, the plaintiffs' assertion that the City deliberately ignored or "wrote out" the potential impact of the 2016 By-law on plate values is baseless. At the outset, it is important to highlight that this is not the first time that this specific claim has been raised before the Superior Court. The plaintiffs' claims directly mirror those raised in *Unifor, Local 1688 v. Ottawa* ("**Unifor**")

89. That case involved an application brought by the Ottawa taxi union, Unifor, under sections 272 and 273 of the *Municipal Act*, seeking to quash the 2016 By-law for bad faith and illegality. Two of the grounds of bad faith alleged by Unifor were claims that the City: (1) "closed its mind" to the economic impact of the 2016 By-law on the taxi industry in general, and plate values in particular; and (2) that the City enacted the by-law for the corollary purpose of dismantling the limit on taxi plates, while avoiding responsibility for compensating plate license holders.¹¹⁶ In her decision, Justice de Sousa expanded on this claim:

[127] In fact, the Applicants argue that he City closed its mind to the competitive and economic ramifications of permitting such competition in passing the 2016 VFH By-law from the very beginning, even as it commenced its review of the VFH industry. According to the Applicants, it did this by refusing to acknowledge how the use of the City's regulatory

¹¹⁵ See e.g. Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at p. 40, heading F; p. 58, heading G; para. 159.

¹¹⁶ *Unifor, Local 1688 v. Ottawa*, 2018 ONSC 3377 at paras. 123, 127 and 209 [*Unifor*].

power, historically and going forward, impacted the economic viability of the existing structures and operation of the taxi industry as it related to taxi drivers' and taxi plate holders' incomes and livelihood.

[128] The Applicants argue that the City behaved in this way because it had already pre-determined that the broader taxi economics, including the "secondary market" of plate value and plate marketability, was outside of the scope of its engagement, as evidenced by the limited terms of reference given to KPMG for the carrying out of the review. It is the position of the Applicants that some of the discussion papers produced by the KPMG review (i.e. "Taxi Economics" done by Hara Associates) raised these issues as well as the issue of plate values as a secondary market. But, the city considered this to be outside of its mandate.

...

[209] In paras. 118 to 122 inclusive of their Factum, and in the oral arguments of their counsel, the Applicants argue as to why the City is responsible for compensating taxi plate holders for the diminution of plate values, that the City "intended from the outset to avoid any responsibility for compensating taxi plate holders for the diminution of that value, and the creation of a "new" class of VFH enabled it to hide behind that fiction that it was not dismantling the taxi regime's restrictions on taxi plates."¹¹⁷ [*emphasis added*]

90. Indeed, the plaintiffs' claim that plate value was deliberately ignored or written out appears to be a corollary attempt by the plaintiffs to litigate the issue of bad faith, which would have been relevant to the originally certified Common Issue 2: whether the 2016 By-law is unlawful. That issue was abandoned at the outset of trial on consent, at the request of the plaintiffs.

91. After reviewing the extensive written record of the VFH Review, including relevant staff reports, minutes, and all the discussion papers and reports produced by KPMG and its subcontractors, Justice de Sousa concluded that neither KPMG nor the City ignored the issues of plate value, or the economic consequences of the 2016 By-law on the taxi industry:

[133] After examining the very lengthy record filed with the Court in this matter, I am not persuaded that the City failed to carry out its due diligence, even as it concerns the economic ramifications of the enactment of the 2016 VFH By-law for the taxi industry.

[134] In my view, the KPMG review and the consultation and response it engendered from the public and the stakeholders of the taxi industry, shone a light on the economic implications of the new competition the taxi industry was facing by the introduction of the app-based VFH, such as Uber. I have already described the scope of the KPMG review in some detail. The KPMG review included studies and discussion papers of the economic impact of the new competition, as well as case studies of other jurisdictions where the app-based VFH already operated. An example of this is the discussion paper produced

¹¹⁷ *Ibid* at paras. 127-128, 209.

by the sub-contractors, Hara Associates and Mowat Centre. (See “Case Studies”, dated October 2015; “Emerging Issues in the Taxi and Limousine Industry”; and “Taxi Economics – Old and New”, dated October 10, 2015, Application Record, vol. II of V, tabs J 9, J 11 and J 13.) All three of these reports dealt with the economic implications of competition to the taxi industry from the new app-based VFH.

[135] The Staff Report of March 31, 2016, carried these discussions of economic implications forward to the CPSC, which in turn carried it forward to the Council before the Council vote on the By-law.

[136] In addition, the lobbying that was carried on by the taxi industry, with City officials, Councillors and in the media clearly highlighted the economic implications of the new competition to the taxi industry. The Council must be taken to have been cognizant of them. One need only listen to the comments made by the various Councillors, prior to voting on the By-law, to conclude that they were very cognizant of the economic consequences of the new regime and certainly had not closed their mind to the subject (See Respondent’s Application Record, vol. 2 of 2, tab. H).

[137] In view of this, it is difficult to conclude that the City’s research and consultation on the topic was inadequate. I found it to be extensive and comprehensive. It is within the discretion of the municipality to conclude that the KPMG review was reasonable or reasonable enough to permit the City to go forward with regime change in the VFH industry.

[138] Nor can I conclude that the City, in enacting the By-law, closed its mind to the economic implications of the regulation change. As the many discussion papers and debates produced by the KPMG review show the issues of, firstly, what causes economic upheavals and fluctuations in the wellbeing of the taxi industry (reasonable salary levels after costs, taxi costs indexes, and the robustness of the secondary industry of plate value) and, secondly, who is responsible for the economic state of the taxi industry is complex and multi-faceted and, I hasten to add, well beyond the scope of this application to resolve.¹¹⁸ [*emphasis added*]

92. As a starting point, Justice de Sousa’s decision should be seen by this Court as highly persuasive. Further, none of the evidence tendered through this trial should displace Justice de Sousa’s conclusion that the City did not ignore or write out the issue of plate values.

93. Indeed, is it clear that the plaintiffs fundamental complaint is one of outcome, not process. Yet, in their dissatisfaction with the outcome of the VFH Review, the plaintiffs mischaracterize and overstate the evidence. The plaintiffs suggest that the City sought “to find ways to legalize Uber,” that it hired a consultant to “appear impartial,” and to “deal with the City’s plate value problem,” and that “class

¹¹⁸ *Unifor*, *supra* note 116 at [paras 133-138](#).

members were deliberately written out of the script.”¹¹⁹ These characterizations of the City’s motivations are not supported by the evidence.

II) The City does not have the authority to compensate plate holders for the street value of their plates

94. The plaintiffs’ assertion that the City deliberately ignored the issue of potential compensation for plate holders rests on the false premise that the City has the authority to compensate plate holders. The City does not have that authority. Any compensation paid by the City to plate holders would be *ultra vires* the City’s authority under the *Municipal Act*.

95. Section 106 of the *Municipal Act* states:

106(1) Despite any Act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose.

106(2) Without limiting subsection (1), the municipality shall not grant assistance by,

- (a) giving or lending any property of the municipality, including money;
- (b) guaranteeing borrowing;
- (c) leasing or selling any property of the municipality at below fair market value; or
- (d) giving a total or partial exemption from any levy, charge or fee.¹²⁰

96. A plain reading of this provision makes it clear that the City cannot monetarily compensate plate holders for the value of their licenses on the secondary market without offending section 106 of the *Municipal Act*. This interpretation is affirmed by the decision of the Ontario Court of Appeal in *Friends of Lansdowne*. In that case, the Court of Appeal confirmed that a municipality will run afoul of section 106 if it grants an “undue obvious advantage.”¹²¹

97. Similarly, the City does not have the authority to implement the type of compensation fund for plate holders established by the provincial government in Quebec, which is funded by a fee charged to

¹¹⁹ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 9.

¹²⁰ *Municipal Act*, 2001, S.O. 2001, c. 25, s. 106.

¹²¹ *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273, at para 49 [*Friends of Lansdowne Inc.*].

users of both Ubers and taxis.¹²² The City's authority to impose fees or charges is set out in section 391 *Municipal Act*, which provides, in part:

391 (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to impose fees or charges on persons,

(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 other municipality or any local board; and

(c) for the use of its property including property under its control.¹²³

98. As the plaintiffs recognize, in order for a fee imposed under section 391 to be lawful, there must be a nexus between the cost to the City of providing the service, and the quantum of the fee.¹²⁴ The City has long recognized this requirement.¹²⁵ A fee charged to users of vehicles for hire for the purpose of funding a compensation fund would not be related to the cost of providing a service, and would therefore be *ultra vires*.

99. Furthermore, charging a fee to the users of vehicles for hire would offend section 394(1)(c) of the *Municipal Act*, which states that a municipality may not impose a fee or charged that is based on, is in respect of or is computed by reference to

c) the use, consumption or purchase by a person of a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law;¹²⁶

100. A fee charged to users of vehicles for hire for the purpose of funding a compensation fund would be based on or in reference to the purchase of a service that is not provided by the municipality, and would therefore clearly be *ultra vires* of this provision.

¹²² Marc André Way, Cross-Examination, January 17, 2023, p.12, line 29 – p. 13, line 6.

¹²³ *Municipal Act*, 2001, S.O. 2001, c. 25, s. 391.

¹²⁴ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 453.

¹²⁵ Exhibit 53, *supra* note 99 p. F2661.

¹²⁶ *Municipal Act*, 2001, S.O. 2001, c. 25, s. 394(1)(c).

101. As early as 2001, KPMG recognized that any plan to compensate plate license holders was *ultra vires* the City's authority under the *Municipal Act*, and would require enabling legislation. On May 24, 2001, KPMG delivered its "Taxi Licensing Issues" Report to the City. The report, whose lead author was Brian Bourns, made a number of recommendations with respect to regulations that would eventually form the basis of the City's first harmonized taxi by-law. The report included a discussion of the possibility of the City paying compensation to plate holders for losses in plate value caused by regulatory changes enacted by the City, and stated, in part:

It would be possible to compensate any plate holders who suffered substantially as a result of a new licensing regime. While it would be equally unfair to charge taxpayers the cost of such compensation, it would be possible to establish an industry funded compensation plan, i.e. to establish a significant annual fee for plate renewals that could be used over time to compensate existing plate holders. However, such an approach would require special legislation, and such legislation was rejected by the province a decade ago.¹²⁷ [emphasis added]

102. The plaintiffs' assertions that the City deliberately ignored the issue of plate values or compensation for plate license holders are unfounded. The City simply cannot compensate plate license holders for the street value of their licenses.

C) Origins of the VFH Review

103. The origins of the VFH Review lie with the City's adoption of the 2012 By-law.

104. On April 11, 2012, City Council approved the re-enactment and minor amendment of the 2005 By-law. That by-law was subsequently re-enacted with amendments as the 2012 By-law. At the same meeting, Council also provided directions to staff to report back on several issues. These types of directions are a standard part of Council debates, and typically result from the desire of Council, or a councillor, to be provided more information on a specific subject.¹²⁸ In this case, the directions from Council were to report back on the following five issues:

¹²⁷ Exhibit 7, June 11, 2001 Report to EPSC and Council, p. F2268.

¹²⁸ Leslie Donnelly, Examination in Chief, January 26 2023, *supra* note 102, p. 61, lines 10-16.

- Given the growth of the City of Ottawa and the future requirement for more taxis to service that growth, staff report back to Council on all possible options for restructuring taxi plate fees, including options for capturing the market value of such plates for the taxpayers of the City of Ottawa.
- That the Chief License Inspector review options to determine how service demands could be met which may include identifying mechanisms which would not allow for the transfer of standard taxicab plates to occur unless such plates were made accessible; and, that staff be directed to investigate the possibility of requiring taxicab owners, when they are purchasing their next vehicle, to purchase accessible vehicles.
- That staff be directed to investigate the possibility of having a commission paid to the City on the value of any transfer sale of a taxi license, e.g. if a taxi license is sold for \$200,000, at 10% commission, the City would receive \$20,000 commission, plus the license transfer fee.
- Staff investigate the potential for the City to obtain first right of refusal to purchase licenses being transferred, this would be an option to be exercised as funding is available with the objective that (over time) the licenses would all be non-transferrable.
- That the 12 remaining accessible taxi plate holder licenses that have not been issued be offered to candidates in accordance with the Accessible Priorities List and related processes provided under the Taxi By-law.¹²⁹

105. Staff ultimately reported back on these directions in a report addressed to CPSC and Council dated May 1, 2015 (the “**2015 Staff Report**”). CPSC is a standing committee of Council charged with oversight of taxi regulation, amongst other things.¹³⁰ Staff’s answers to the various directions can be summarized as follows:¹³¹

	Issue	Response
1.	Given the growth of the City of Ottawa and the future requirement for more taxis to service that growth, staff report back to Council on all possible options for restructuring taxi plate fees, including options for capturing the market value of such plates for the taxpayers of the City of Ottawa.	The 2012 By-law does not take into account any market value that may exist in relation to a plate license, and instead focuses on public safety, public interest, and consumer protection. Furthermore, the City does not have the authority under the <i>Municipal Act</i> to charge fees based on the market value of taxi plates alone, if that fee is unrelated to the delivery of a municipal service.
2.	That the Chief License Inspector review options to determine how service demands could be met which may include identifying mechanisms which would not allow for the	This would require amendments to the 2012 By-law. Staff recommend retaining a consultant to conduct a comprehensive review

¹²⁹ Exhibit 53, *supra* note 99, at pp. F2657-F2661.

¹³⁰ Leslie Donnelly, Examination in Chief, January 26 2023, *supra* note 102, at p. 53, lines 8 – 19.

¹³¹ Exhibit 53, *supra* note 99, at pp. F2657-F2661.

	transfer of standard taxicab plates to occur unless such plates were made accessible; and, that staff be directed to investigate the possibility of requiring taxicab owners, when they are purchasing their next vehicle, to purchase accessible vehicles.	of accessible taxicabs, transferability, and other issues, as outlined later in this report.
3.	That staff be directed to investigate the possibility of having a commission paid to the City on the value of any transfer sale of a taxi license, e.g. if a taxi license is sold for \$200,000, at 10% commission, the City would receive \$20,000 commission, plus the license transfer fee.	The 2012 By-law does not take into account any market value that may exist in relation to a plate license, and instead focuses on public safety, public interest, and consumer protection. Furthermore, the City does not have the authority under the <i>Municipal Act</i> to charge a commission based on the market value of taxi plates alone, if that fee is unrelated to the delivery of a municipal service.
4.	Staff investigate the potential for the City to obtain first right of refusal to purchase licenses being transferred, this would be an option to be exercised as funding is available with the objective that (over time) the licenses would all be non-transferrable.	Staff do not believe that this is necessary, as taxi plates remain the property of the City under the 2012 By-law.
5.	That the 12 remaining accessible taxi plate holder licenses that have not been issued be offered to candidates in accordance with the Accessible Priorities List and related processes provided under the Taxi By-law.	As of March 31, 2015, there are in operation 187 accessible taxi plate holder licenses. There are no additional plates to be issued.

106. The 2015 Staff Report added, as a general conclusion, that:

The City's role is to regulate taxi service, not operate it, within the parameters of its enabling authority in the *Municipal Act, 2001*. Further, as regulator, it is not appropriate for the City to be directly involved in the economic status of the industry. It is the objective of the City, as regulator, to ensure public safety, public interest and consumer protection.¹³²

107. In addition, the 2015 Staff Report recognized that the VFH landscape had changed, as a result of the entry of Uber into the Ottawa market. As such, it recommended that Council approve a comprehensive review of the City's taxi and limousine regulations. The report states:

Given the information and general conclusions contained in this report, as well as the emergence of new technologies and other service models since the time of Council's 2012 motions and directions to staff, the Emergency and Protective Services Department

¹³² Exhibit 53, *supra* note 99, at p. F2661.

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. The review will be based on the following guiding principles:

1. Public Safety - including vehicle condition, insurance requirements, driver qualifications and other screening processes
2. Accessibility - service delivery model that considers aging population and meets the needs of the accessible community
3. Consumer Protection - including measures to protect both the passenger and the driver, means by which to establish reasonable fares for service, and thorough complaint resolution processes.

The consultant will undertake a comprehensive review of the taxi and limousine industries in Ottawa in terms of their service to residents and visitors. The scope of the work will include:

- review and analysis of the existing regulatory framework, such as the current Taxi By-law and the Limousine Licensing Schedule of the Business Licensing By-law, including the City's fees and charges, the formula for establishing taxi and limousine fares, the formula for determining the number and type of plates issued, and the manner in which the plates are managed by the industry;
- review and analysis of emerging technologies and alternate service models;
- review and evaluation of the current taxi and limousine system in terms of its service delivery, including:
 - a) collection of data such as average wait times, average cost of a fare, ability to service all neighbourhoods and client groups in Ottawa;
 - b) identification of the pros and cons of limited and unlimited taxi plates, and transferability;
 - c) assessment of whether or not the current system sufficiently supports the City's long-term accessibility and transportation needs (i.e. ParaTranspo and Light Rail operations);
- benchmarking with other major cities;
- using the most appropriate and effective methods, design and coordination of both stakeholder and public consultations to solicit input on client satisfaction and ways to improve the current system, and on the impacts of new technologies and service models;¹³³

¹³³ Exhibit 53, *supra* note 99, at p. F2661-3.

108. The report recommended that the results of the review would be reported to Council in 2016. It recognized that consultations with affected stakeholders, including the taxi industry and consumers, would be a critical part of the review:

The results of the comprehensive review will be reported to Council in 2016 and will have included consultations with the public and key stakeholders in the affected industries and consumer communities. The review report will include recommendations, as directed by Council in 2012, for improvements to the City's taxi, limousine and transportation-for-a-fee services, giving consideration to new technologies.¹³⁴ [*emphasis added*]

109. As Leslie Donnelly – who was Deputy City Clerk at the time of the enactment of the 2012 By-law – explained, the proposed regulatory review required consultation with a wide range of stakeholders, including the various segments of the taxi industry, and the accessibility community:

Q. All right, and what would be the — who would be the stakeholders with whom the consultant was to seek out and — or input?

A. Well, it would be everyone we license in this — with this by-law so the, the — all the taxi licensees, so the brokers, plate holders, drivers, limousine, all the limousine services that we currently license and it would be looking at those responsible choice vehicles, the odd — what they call auxiliary services, the pet taxis, the — that part and then it would be the accessibility community so the Para Transpo users, the Accessibility Advisory Committee, but also the City's in quite regular contact with organizations that serve the accessibility communities, so the disabled person's community resource centre, the CNIB, we routinely conduct accessibility audits on some of our infrastructure, so those stakeholders and then reach out as they can to the general public.¹³⁵

110. Notwithstanding the innocuous recommendations in the 2015 Staff Report, the plaintiffs mischaracterize the evidence surrounding it in an effort to ascribe nefarious intent to the City.

111. By way of example, the plaintiffs imply that staff intentionally avoided reporting back on the directions from Council for three years, and suggest that this is “likely due to the sensitive nature of the questions.”¹³⁶ The evidence does not support this interpretation. Rather, as Christine Hartig explained, while staff did hold back on the report until after the 2014 municipal election, they did so out of recognition that the new council would likely wish to have input into this complex issue:

¹³⁴ Exhibit 53, *supra* note 99, at p. F2663.

¹³⁵ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 72, lines 2-17.

¹³⁶ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 127.

Q. All right. And can you tell us why it took three years for staff to respond to the inquiry of council in April of 2012?

A. There were certainly a number of complex issues in this — of the resolutions or, or directions from council. But also there was an election year in 2014, as I recall, so we elected — excuse the word elected. We decided not to move forward with this level of complexity, especially, you know, in the event that it might impact what, what the next council might wish to do.¹³⁷ [*emphasis added*]

112. The plaintiffs similarly mischaracterize Ms. Hartig’s evidence with respect to the intention of staff’s recommendation. They cite Ms. Hartig’s February 6, 2023 cross-examination in support of the proposition that “it is clear from the report that at this point, the City was looking for ways to legalize or regulate Uber”.¹³⁸ The implication that legalization of Uber was a foregone conclusion is not supported by Ms. Hartig’s evidence:

Q. So when - in 2015 when this by-law review process began, is it fair to say that the City was looking for a way to legalize Uber?

A. Looking for a way to determine whether they should be regulated, and how.

Q. And possibly legalized or regulated?

A. Possibly.¹³⁹ [*emphasis added*]

113. Finally, the plaintiffs characterize the City’s reasons for engaging a consultant as “murky.” They are not. Both Ms. Donnelly and Ms. Hartig were clear and consistent that staff recommended retaining a consultant for three reasons: (1) to ensure that the VFH Review was being conducted using appropriate expertise; (2) the consultant would have capacity to complete the review in a timely manner; and (3) to ensure that it was conducted in a manner free from both perceived and actual bias.

114. In her examination in chief, Ms. Donnelly gave the following evidence:

Q. And in, in, in terms of the next steps here, did a City staff propose that they would undertake the review themselves?

A. No. They recommended an independent consultant.

¹³⁷ Christine Hartig, Examination in Chief, February 2, 2023, p. 86, line 29 – p. 87, line 3.

¹³⁸ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 130 and note 176.

¹³⁹ Christine Hartig, Cross-Examination, February 6, 2023, p. 2, lines 24-30.

Q. And why would that be the chosen recommendation?

A. Well, when you're undertaking a review of this nature, you want, you want a full picture, so you want to reduce some any internal bias that may exist but also, you want to be sure you have the widest variety of expertise and some of those things the City may not have, either may not have in house or may not be free to, to do such a review that leads to undue delays. So independent consultants are a, a typical way to do it, and frankly, council will often listen to independent consultants and their information more directly than sometimes they listen to staff.¹⁴⁰ [*emphasis added*]

115. Ms. Donnelly's evidence aligns with that of Ms. Hartig, who gave the following evidence in cross-examination:

Q. Okay. And yesterday you said that consultants are hired, in general terms, you said consultants are hired in certain instances. You said it's — when the city doesn't have the capacity due to either time demands or expertise, and you also said that sometimes it's useful for objectivity that some folks might not think staff are objective, so the city asks someone external. Did I capture that correctly?

A. Yeah.

Q. And which one of those applies in the case of the 2015 By-law review?

A. The first two for sure, we wouldn't have had the capacity to do all that work in that, in that timeframe.

Q. So the first two being capacity and....

A. What was the other one, sorry?

Q. Well, there was a capacity due to time or expertise and then there was objectivity.

A. So for sure capacity, expertise, I mean we would have had to hire Dan Harrah, which we, which we have done before when it comes down to the number crunching, which he's great at. We would have had to hire him anyways. We just didn't have the capacity to do it. And, and, you know, the ability to — well, and expertise to some degree as well. And it's nice to have — like you know, in the case of an outside person so that, you know, the taxi industry doesn't necessarily have to — I mean, you know, they dealt with staff very congenially over the years, you know, no issues. But they might have liked to participate in something that we weren't controlling. So we participated, we were at all the meetings, I heard what people had to say, we wanted to hear what the, the public, the driver — like we had Uber drivers, taxi drivers, the public at these workshops. First time the public ever showed up actually which was interesting. And so we participated in that. But it's nice to have somebody else organizing all that, it's a lot of work.

Q. So when — and so does that fall a little bit under the objectivity purpose you were talking about to have some external from the city dealing with the stakeholders?

¹⁴⁰ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, p. 70, lines 7-23.

A. Somebody different, somebody who's not going to, you know have any preconceived notions of things.¹⁴¹ [*emphasis added*]

116. The plaintiffs' objection to the City's use of a consultant to conduct the VFH Review is puzzling, given that the City routinely used consultants to conduct reviews of the taxi industry. Examples include the following:

- (a) In 2001, the City retained KPMG to conduct the first comprehensive review of the taxi industry following amalgamation. The review was conducted to assist staff to recommend "an appropriate regime for the regulation and licensing of taxis and limousines in the new City of Ottawa, and an approach to implementing those requirements." The lead author of the 2001 report was Brian Bourns;¹⁴²
- (b) In 2004, the City retained Hara Associates and KPMG to review and revise the Taxi Cost Index ("**TCI**", which is the basis for setting taxi meter rates) and to determine appropriate ratios for the issuance of standard and accessible taxi plates. KPMG's role in that project was led by Brian Bourns;¹⁴³ and
- (c) In 2011, the City retained Hara Associates to once again review and revise the TCI.¹⁴⁴

117. In short, there was nothing unusual in the 2015 Staff Report's recommendation that the proposed comprehensive review be conducted by a consultant. It was common practice for the City in general, and for reviews of the taxi industry in particular.

¹⁴¹ Christine Hartig, Cross-Examination, February 3, 2023, p. 154, line 26 – p. 155, line 31.

¹⁴² Exhibit 7, *supra* note 127 p. F2229 and F2244.

¹⁴³ Exhibit 150, Replacement for Taxi Cost Index and Review of Taxi Plate Numbers, presentation to EPS, p. A1512.

¹⁴⁴ Exhibit 169, Ottawa Taxi Cost Index, 2011 Update, p. A2103.

D) The City issues a request for proposals and retains KPMG

I) The Request for Proposals

118. On May 27, 2015, City Council approved the comprehensive review proposed in the 2015 Staff Report.¹⁴⁵ On July 9, 2015 the City issued the RFP seeking from qualified consultants and/or consulting firms to complete a “comprehensive review of the City's taxicab and limousine industries in respect of service delivery to residents and visitors, together with a review of the City's current regulatory framework for these areas.”¹⁴⁶ The use of the RFP process is one of two typical methods that the City uses to hire consultants to undertake regulatory reviews, the other method being a selection from the City's standing offer list.¹⁴⁷

119. The RFP stated that the review is to be based upon the following guiding principles:

1. Public Safety - including vehicle condition, insurance coverage, driver and other screening processes;
2. Accessibility - service delivery model that considers aging population and meets the needs of the accessible community; and,
3. Consumer Protection - including: measures to protect both the passenger and the driver; means by which to establish reasonable fares for service; and, thorough complaint resolution processes.¹⁴⁸

120. The project description stated:

The successful proponent will be required to complete a comprehensive review of the current regulatory framework for taxicabs and limousines, as well as a comprehensive review of the taxicab and limousine industries in Ottawa and other major cities in North America, at a minimum. The review will require extensive research, analysis, and benchmarking including stakeholder and public consultation to solicit input on client satisfaction and ways to improve the current system, and on the impacts of new technologies and service models.¹⁴⁹ [*emphasis added*]

¹⁴⁵ Exhibit 109, *supra* note 100, at p. F115

¹⁴⁶ Exhibit 110, *supra* note 101, at p. F1054.

¹⁴⁷ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 75, line 27 – p. 76, line 2.

¹⁴⁸ Exhibit 110, *supra* note 101, at p. F1071.

¹⁴⁹ *Ibid.*

121. The RFP included requirements for research, review, and analysis with respect to specific topics. It also recognized and mandated the need for wide-ranging consultation with affected stakeholders, including members of the taxicab industry, consumers, and individuals with mobility issues:

Research, Analysis, Benchmarking

- Complete a review and analysis of the existing regulatory framework including:
 - City of Ottawa Taxi By-law (2012-258), as amended and the Limousine Service Licensing Schedule of the Business Licensing By-law (Schedule 10 of By-law 2002-189, as amended);
 - City's current licensing fees and charges;
 - Formula for establishing taxicab and limousine fares;
 - Formula for determining the number and type of taxi plates issued, and the manner in which the plates are managed.
- Complete a review and analysis of Ottawa's current taxicab and limousine service delivery model. This includes:
 - The collection of data on relevant issues such as average wait times and fares;
 - An assessment of Ottawa's ability to provide accessible taxicab and limousine services to all neighbourhoods and client groups;
 - An assessment of whether or not the current system sufficiently supports the City's long-term accessibility and transportation requirements and services such as Para Transpo and the Light Rail Transit system (LRT)
- Consult with members of the public and key stakeholders to identify major issues and concerns regarding Ottawa's taxicab and limousine industry. Those consulted will include users of taxicab and limousine services and key stakeholders including taxicab and limousine drivers, brokers, and unique users including individuals with mobility issues;
- Complete a review and analysis of emerging issues in the taxicab and limousine industries, new technologies such as app-based technologies, new hailing technologies, transportation for a fee service models, and alternate service delivery models used in other municipalities, and potential regulations to address the above, including evaluating compliance requirements under the *Accessibility for Ontarians with Disabilities Act, 2005*, as amended (AODA)
- Conduct research to evaluate the advantages and disadvantages of open-entry and closed taxicab markets; and,
- Prepare an interim report on findings with draft recommendations for addressing public and stakeholder concerns and improving Ottawa's taxicab and limousine industry, including its regulatory framework as the case may be.

Stakeholder and Public Consultations

Using the most appropriate methods and tools, the successful Proponent will:

- Design, coordinate and facilitate stakeholder and public consultations using findings and draft recommendations from the research, analysis and benchmarking activities above;
- Summarize input from participants and allow it to inform final recommendations for improving the overall delivery of taxicab and limousine services across Ottawa;¹⁵⁰ [*emphasis added*]

122. Finally, the RFP specified requirements for a final report, which was to be informed by the required research, analysis and consultation, and informed by the guiding principles of public safety, accessibility, and consumer protection:

Final Report on Findings and Recommendations

In keeping with the guiding principles for this review (public safety, accessibility, and consumer protection), the successful Proponent will prepare a report on findings with final recommendations for improving Ottawa's taxicab and limousine industry and the current regulatory framework, as the case may be. The report must include, but is not limited to including the following:

- Details on the methodology and approach used to complete project activities and deliverables;
- Findings from project activities and deliverables; and,
- Final recommendations for addressing public and stakeholder concerns and improving Ottawa's taxicab and limousine industry.

This report will be presented to City Council in 2016.¹⁵¹

123. The RFP included a standard proposal scoring system, and had a closing date of July 30, 2015.¹⁵² It was posted on MERX, an online tendering service providing access to contracting opportunities with the federal government, as well as provincial and municipal governments across the country, and various other public authorities, including governmental agencies, school boards, and crown corporations. The RFP was open to a competitive bidding process.¹⁵³

¹⁵⁰ Exhibit 110, *Ibid* at p. F1072-3.

¹⁵¹ Exhibit 110, *Ibid* at p. F1073.

¹⁵² Exhibit 110, *Ibid* at pp. F1060 and F1067.

¹⁵³ Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 157, lines 2-8.

124. KPMG responded to the RFP on July 30.¹⁵⁴ The evidence demonstrates that KPMG was the only bidder to respond to the RFP. Ms. Hartig's evidence on cross-examination was simply that she "presumably" reviewed proposals from other proponents.

MS. SANDILANDS: Q. So, Ms. Hartig, you reviewed this proposal?

A. Yes.

Q. And presumably you reviewed the proposals from other proponents as well?

A. Yes.¹⁵⁵

125. That answer must be seen in the context of Ms. Hartig's evidence given immediately prior to this question that she was part of the review panel for the selection of the consultant.¹⁵⁶ On re-examination, Ms. Hartig clarified that she did not actually recall that there were any other proponents:

Q. All right. And my friend asked you some questions about the retention of KPMG. She asked you those questions this morning. And do you recall if there were other bidders, other than KPMG, in response to the request for proposals?

A. I don't recall that there were.¹⁵⁷

126. Ms. Hartig's clarification should be preferred over her original supposition, given that there is no evidence that any other bidder responded to the RFP.

127. Contrary to the plaintiffs' claim, there was nothing "pre-determined" about the City's selection of KPMG.¹⁵⁸ Having set up a competitive bidding process on MERX, the City had no control or input into who would respond to the RFP. There is nothing abnormal about the City receiving a single response to a RFP, and there is nothing untoward about the City retaining the only proponent. This is particularly so given that the consultant had subject matter expertise in relation to the VFH industry in the City of Ottawa.

¹⁵⁴ Exhibit 162, KPMG Proposal to Serve, July 30, 2015, p. A2197.

¹⁵⁵ Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 161, lines 6-8.

¹⁵⁶ Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 160, lines 2-4.

¹⁵⁷ Christine Hartig, Re-Examination, February 6, 2023, *supra* note 139, at p. 103, lines 1-6.

¹⁵⁸ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 146.

II) The project team

128. KPMG's Proposal to Serve included service from three subcontractors: Hara Associates, the Mowat Centre, and Core Strategies.¹⁵⁹ Brian Bourns of KPMG was the project manager. Mr. Bourns explained that KPMG included the subcontractors in its project team to "expand the skills available," in general, and in particular for their expertise with respect to the specific topics of research, analysis and consultation set out in the RFP:

- (a) Dan Hara, the principal of Hara Associates, is an economist who has frequently worked with the City on issues relating to the taxi industry. As required by the RFP, Hara Associates was selected to provide research and analysis regarding: (1) the existing regulation of the taxi industry; and (2) the economics of the existing taxi industry, including as they relate to plate value, and the advantages and disadvantages of an open and closed entry plate system.
- (b) The Mowat Centre is a public policy municipal think tank with research experience in the sharing economy. KPMG selected Mowat to fulfill the RFP requirements for review and analysis of emerging issues in the taxicab and limousine industries, including the emergence of new technologies and service models.
- (c) Core Strategies had experience conducting surveys of users of OC Transpo, and was selected to fulfill the RFP's requirements for consultation with users of taxicab and limousine services. Mr. Bourns described the role of Core Strategies as "to get a view from the public, you know, potential users or real actual users of taxi and/or a ABSM service with a view to — trying to get the objective view... to give some objective sense of what the population thought."¹⁶⁰

¹⁵⁹ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 14, lines 26-30.

¹⁶⁰ Brian Bourns, Examination in Chief, January 31, 2023, *Ibid*, at p. 22, line 3 – p. 23, line 1.

129. As project manager, Mr. Bourns was particularly well-qualified for the project. Mr. Bourns is the founder of Maclaren Municipal Consulting, which provides consulting services to municipalities across the country on a wide range of subjects, including by-law services and enforcement.¹⁶¹ Prior to founding Maclaren in 2016, Mr. Bourns was a Senior Manager with KPMG for 25 years, working almost exclusively with municipal clients. In his time with Maclaren and KPMG, Mr. Bourns has conducted approximately 150 consulting projects with municipalities for more than 50 municipalities.¹⁶²

130. Mr. Bourns has extensive experience consulting for the City of Ottawa, having conducted projects including: a comprehensive review of OC Transpo including recommendations for service enhancement and route design; various reviews for Ottawa Public health on topics including vaccine tracking, library services, and evaluations of its influenza clinics and sexual health centres; and a real property asset rationalization review for the Public Works department.¹⁶³

131. Mr. Bourns also has specific experience with the Ottawa taxi industry. As the plaintiffs concede, Mr. Bourns has been involved in the Ottawa taxi industry since the 1970s – first as a politician in the Former City, and later as a consultant.¹⁶⁴ Further, and as outlined above, Mr. Bourns served as the lead consultant for the two major reviews of Ottawa’s taxi regulation prior to 2015, which occurred in 2001 and 2004.¹⁶⁵ Indeed, in their submissions, the plaintiffs cast Mr. Bourns’ work in those reviews in a favourable light.¹⁶⁶ Mr. Bourns was familiar with key stakeholders in the taxi industry, including Mr. Way, and had also led a review of the taxi industry in Gatineau in or around 2003.¹⁶⁷

¹⁶¹ Brian Bourns, Examination in Chief, January 31, 2016, *Ibid*, at p. 4, lines 12-27.

¹⁶² Brian Bourns, Examination in Chief, January 31, 2016 *Ibid*, at p. 10, lines 13-18.

¹⁶³ Brian Bourns, Examination in Chief, January 31, 2023, *Ibid*, at p. 11, line 26 – p. 12, line 14; Exhibit 137, Brian Bourns CV, 2022, pp. B-1-8519, 21, 22, 27 and 31.

¹⁶⁴ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 137.

¹⁶⁵ Exhibit 7, *supra* note 127, at p. F2244; Exhibit 150, *supra* note 143, at p. A1512

¹⁶⁶ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at paras. 82 and 85.

¹⁶⁷ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 34, line 23 – p. 35, line 4; Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, p. 10, line 23 – p. 11, line 9.

132. KPMG, whose project team was led by Mr. Bourns, was selected because it was the only bidder for the RFP. Despite being the only bidder, it is difficult to imagine a more qualified project lead than Mr. Bourns.

133. Notwithstanding his ample qualifications, the plaintiffs imply either that Mr. Bourns was selected as project manager on the basis of his established views on the taxi industry, or that he was incapable of conducting the VFH Review objectively, because he expressed views on the taxi industry 40 years earlier. This assertion is not tenable. Mr. Bourns served as a municipal politician for 11 years, serving on various committees, as well as the councils of the Former City and the RMOC.¹⁶⁸ During that time, Mr. Bourns was presumably required to take positions on a wide variety of topics, including some that he would ultimately revisit in his later career as a consultant.

134. The suggestion that Mr. Bourns is incapable of approaching a subject objectively simply because he once expressed a view on that subject is not supported by any evidence, and is simply an unfounded attack on his professional integrity – one which is deployed in an attempt to undermine the credibility of the VFH Review writ large.

III) The proposal to serve

135. The City agrees that after KPMG was selected on the basis of its July 30 proposal, the VFH Review was accelerated by one month, at the request of the Mayor to Ms. Jones.¹⁶⁹ As Ms. Jones explained, the context for that request was that Uber drivers were continuing to operate illegally, and both the City and the taxi industry were anxious to reach a decision regarding a regulatory path forward:

Q. All right. Now in that piece of video that we just looked at, you said that the review had been fast tracked by the mayor. Correct?

A. The mayor had made that request.

Q. Yes. And do you know why the mayor had asked that it be fast tracked?

¹⁶⁸ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, p. 5, line 27 – p. 8, line 3.

¹⁶⁹ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 147.

A. I think everybody was anxious about and concerned about the fact that Uber, and this is 2015. Correct?

Q. Correct.

A. Uber was continuing to operate illegally, and that he wanted the review to be done as soon as possible so that the matter could be dealt with and final decisions made to....

MR. CONWAY: Your Honour, Your Honour, I'm, I'm rising on this because this is not consistent with the rules on re-examination. My friend is now over, going over material that he examined in-chief. The witness was not able to explain. She did not, she testified in cross-examination. She didn't speak about about this direction. And so she's now proposing to, to now explain, apparently, what, what the mayor's reasoning was, and that is an improper question for re-examination.

MR. BURKE: Your Honour, I don't believe I asked her about why the mayor may have fast tracked it in direct examination. It's a matter that was put to her in cross-examination, and I believe that in re-examination, I can ask a question about that, provided that I'm not leading the witness, and I do not believe that I've led the witness in that regard.

THE COURT: I agree with Mr. Burke.

MR. BURKE: Thank you. Continue, Ms. Jones.

A. Could you ask the question again, please? What is, what is your understanding as to why the mayor asked that the review be fast tracked?

MR. CONWAY: And just to get, Your Honour, just to be clear, is my friend proposing to ask this witness about conversations she had with the mayor or what she understood from others. That's an important, important distinction. And, again, I raise my objection that she can't testify about stuff she heard from other people because it's hearsay.

MR. BURKE: Well, first of all, I asked my, I asked the witness what was her understanding. I don't believe that — I'm just asking for her understanding. So I, I think that's a fair and legitimate question, Your Honour.

MR. CONWAY: It is not, Your Honour. In my submission, that's not a proper question. If she's got an understand — well, she's got an understanding about what the mayor had in his mind, and she got that understanding from, from some source, then she should identify that source. But otherwise, this is just, you know, the mayor should be here testifying why he, why he determined that he, he was going to fast track it and why he instructed staff to do that. It's not proper for the city to be introducing evidence about the mayor's motivation through a witness that apparently didn't speak to him.

THE COURT: Well, I, I think your objections are noted for the record, so please continue. All right.

MR. BURKE: Thank you, Your Honour.

MR. BURKE: Q. Again, Ms. Jones, what was your understanding as to why the mayor was asking that the review be faster?

A. Because of the anxiousness of the industry and the concern that illegal activity was continuing to take place and that he wanted that expedited so that the matter could be

dealt with and finally decisions made on the future direction on how to proceed and deal with this.¹⁷⁰ [*emphasis added*]

136. Ms. Jones' evidence demonstrates that acceleration of the VFH Review by one month was a reasonable, and indeed responsible decision on the part of the City in a context where Uber continued to operate outside of the regulatory regime.

137. On August 20, 2015, KPMG met with the City regarding its Proposal to Serve and subsequently submitted a slightly revised proposal, at the City's request, the next day. The changes between the two proposals were minor, and related to:

- (a) A shortening of the project timeline, with the delivery date for the final report moved up by one month from January 31, 2016 to December 31, 2016;
- (b) The elimination of the proposed wait time survey and public survey of VFH users, to facilitate the shorter timeline; and
- (c) Clarification that KPMG would conduct stakeholder and public consultations in English and French, and that the City would be responsible for translating documents from English to French.¹⁷¹

138. The relative insignificance of the changes between the two versions of the Proposal to Serve demonstrates that acceleration of the VFH Review by one month did not materially affect KPMG's ability to satisfy the requirements of the RFP. Beyond this one meeting, the City provided no further direction to KPMG regarding the Proposal to Serve or KPMG's methodology in carrying out the VFH Review.¹⁷²

139. In its Proposal to Serve, KPMG demonstrated its awareness of the unique challenges that the City was facing through the VFH Review. In particular, KPMG foresaw challenges posed by the speed

¹⁷⁰ Susan Jones, Re-Examination, February 10, 2023, pp. 95-97.

¹⁷¹ Exhibit 162, *supra* note 154, pp. A-2246-7; Exhibit 138, KPMG Proposal to Serve, August 21, 2015, pp. F1048-9; Exhibit 163, Email chain between Brian Bourns and Phillip Powell, August 21, 2015, p. F2297.

¹⁷² Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 15, lines 18-26; Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 83, lines 15-20.

and scale of change represented by Uber, as well as those arising from the impact of Uber on the established taxi industry, which typically represented a source of entrenched political power, along with the need for the City to balance a multiplicity of competing interests. KPMG described the project challenges as follows:

The Unique Nature of the Sharing Economy

Two key characteristics of the sharing economy challenge policymakers: the speed and scale of change and the difficulty of categorizing these enterprises. Sharing economy platforms can grow incredibly quickly compared to traditional businesses, because they require minimal infrastructure, allowing them to expand, evolve and spread to new markets at incredible speed.

Sharing economy enterprises are also difficult to categorize. They are not simply new entrants into an existing market. Is Uber, for example, a taxi company or a collection of independent contractors backed by a technology company?

Put together, these two factors make legislation and effective regulatory development and enforcement extremely difficult. This leads us to our next point.

The Limitations of Existing Regulatory Models

The way that governments manage policy and regulation can make it difficult to respond to disruptive innovations like the sharing economy. Prescriptive structures can be slow to respond to new ways of doing business. The resulting lag can mean that governments are unable to keep pace with protecting the public interest and that different businesses in the same sector face different sets of rules.

Political, Economic and Social Ramifications

For governments, and particularly politicians, the voices of key stakeholders loom large. When a large and well-formed constituency has concerns, politicians will listen.

The sharing economy threatens to upend some of those organized traditional businesses such as taxis, hotels and retailers. The reaction from those groups has been swift. Taxi companies across North America and Europe have joined up efforts to oppose Uber and have also intensively lobbied politicians to introduce legislation with stiff penalties for drivers of illegal cabs.

Politicians are in an uncomfortable spot. They are being lobbied intensively by vested interests, but cannot close their eyes to the fact that technology is moving forward and the horse and also have many constituents who find the ABSMs an attractive alternative. They must carefully balance the weight of existing operators, who are concentrated and organized , against broad but diffuse interests (such as voters or consumers).¹⁷³
[emphasis added]

¹⁷³ Exhibit 138, *supra* note 171, at pp. F1042-3.

140. KPMG also identified a number of “project success factors and risks.” The discussion of these factors once again emphasized the difficulty of balancing a multiplicity of competing interests, and highlighted the importance of consultation with these various interests:

Vested Interests: There are many people who gain their livelihood from the vehicle-for-hire industry. They are involved as drivers, plate owners, dispatchers and as suppliers. Many taxi drivers are part of a union, which in turn has created a circumstance where some drivers have a controlled plate rental cost, while others do not - and hence some plate owners who enjoy the full value of their plates, while others enjoy only part of the value of the plate while the driver who has the right to lease the plate enjoys part of the value, that in turn may be transferred for value. Blue Line and Coventry Connections plays a particularly important role as the main service provider to the industry, and in many ways, a key force in both driving change - and resisting change. Similarly, the ABSMs have attracted an unknown number of drivers who are earning at least part of their livelihood from the industry, and Uber in particular has demonstrated it will participate aggressively in the policy making process. This project must include consultation with all these interests, and the consultation must be carried out in a respectful, meaningful and thoughtful manner. Each of these parties must feel that they have been heard and understood. They may not all be fully satisfied with the outcomes, but the communications process must be effective in ensuring they know the basis for and rationale for the outcomes that are proposed.

Public Interests: There are important public interests that cannot be lost in the discussion. The purpose of the vehicle-for-hire industry is to serve the public - to provide transportation services. This process needs to identify those public interests, quantify them, evaluate and understand them. They do extend beyond getting from A to B. They involve the ride "experience", the payment process, the information process, the time of day, the particular locations. The process also needs to help give a voice to these public interests, to make them part of a process which can often be dominated by the clashing vested interests. The three guiding principles the City has elaborated (public safety, accessibility and consumer protection) certainly point to the need to serve these public interests.¹⁷⁴ [*emphasis added*]

141. The other success factors and risks included: the need to consider the City’s transportation system holistically; the issue of whether, if licensed, ridesharing services should be required to provide accessible service; the need to ensure that vehicles for hire operate in a manner consistent with public safety; and the potential impact of licensing of ridesharing services on the value of plate licenses. The Proposal to Serve states:

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

¹⁷⁴ Exhibit 138, *supra* note 171, at pp. F1043-4.

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.¹⁷⁵ [emphasis added]

142. KPMG's statement that compensation for plate holders is inconsistent with the legislative environment is not a novel position. As set out above, KPMG first articulated this view in 2001. Further, it is the City's submission that for the reasons set out above, this statement is correct – it is clear from a plain reading of the relevant provisions of the *Municipal Act* that the City lacks the authority to compensate plate license holders for the street value of their plates. Given KPMG's understanding of the statutory limits on the City's ability to compensate, it was responsible of KPMG to identify that it would be important "not to raise expectations."

143. KPMG proposed to address these challenges and risk factors with the detailed methodology set out in the Proposal to Serve, which it summarized as follows:

...the regulations and services review mandate in question will consist of an iterative three-phased process carried out over five months, as follows:

- A rigorous research, analysis and benchmarking process
 - Review and analysis of existing regulatory framework
 - Review and analysis of Ottawa's existing taxi and limousine service delivery model
 - Review and analysis of emerging issues related to the taxi and limousine industries
 - Theoretical modeling of open-entry and closed markets based on findings
 - Production of a preliminary report.
- **Stakeholder and Public Consultations**

¹⁷⁵ Exhibit 138, *supra* note 171, at pp. F1044.

- Design, plan and coordinate stakeholder consultations
- Summarize input from participants for final report preparation.
- **Final Report on Findings and Recommendations**
 - Delivery of a final report, complete with findings and recommendations, to the City of Ottawa.¹⁷⁶ [*emphasis added*]

144. The detailed methodology once again emphasized the need for robust consultations with “key industry stakeholders,” stating:

We will interview key industry stakeholders, representatives of Blue Line and other taxi firms, Uber, and the union very early in the process to obtain their assessment of the current situation, what should be done, and why. We will meet with them again, later in the process, as the consultation process is wrapping up.¹⁷⁷

145. Further, it outlined a methodology for consultation with drivers, plate license holders and members of the public that would “give all interested parties the opportunity to participate, and to be seen as participating.” This methodology included: posting all material on a publicly accessible website; advertising the VFH Review through the City’s social media; and conducting a series of “targeted workshops,” “generally with stakeholders having a shared interest.”¹⁷⁸

E) The regulatory review begins

1) The plaintiffs were involved in consultations from the outset

146. It is not controversial that from the very outset, the City and KPMG made extensive efforts to inform the public and all interested parties about the VFH Review, and to seek their input. The City set up a page on its website dedicated to the VFH Review, which provided an overview of the review mandate and process, a timeline, and links to all documents that were released. The website also included information on how to get involved, including a dedicated telephone hotline and dedicated email address where comments could be submitted. The City advertised the VFH Review through its

¹⁷⁶ Exhibit 138, *supra* note 171, at p. F1041.

¹⁷⁷ Exhibit 138, *supra* note 171, at pp. F1049.

¹⁷⁸ Exhibit 138, *supra* note 171, at pp. F1050-51.

social media channels, including the City's Facebook page and through its Twitter account, using the Twitter handle #otttaxi.¹⁷⁹

147. In addition to these efforts targeting the general public, the City and KPMG took specific measures to inform members of the plaintiff class about the VFH Review, and to solicit their input. Posters advertising the review were displayed at the offices of the By-law and Regulatory Services ("BLRS") branch and Coventry Connections, and at the airport. The City also sent pamphlets advertising the VFH Review to all licensed taxi drivers in the fall of 2015, along with the notices for their fall vehicle inspections.¹⁸⁰ The pamphlet stated:

In May of 2015, City Council approved the scope of a comprehensive review of the City's taxicab and limousine regulations. A Request for Proposals was issued and KPMG LLP was the successful proponent.

Review Mandate

To complete a comprehensive review of the City's taxicab and limousine industries in respect of service delivery to residents and visitors, together with the City's current regulatory framework for these sectors while recognizing the emergence of new hailing technologies and transportation-for-a-fee service models.

Three guiding principles:

1. **Public Safety** - Vehicle condition, insurance coverage, driver and other screening processes
2. **Accessibility** - Service delivery model that considers the aging population and meets the needs of the accessible community
3. **Consumer Protection** - Measures to protect both the passenger and the driver; means by which to establish reasonable fares for service; and thorough complaint resolution processes

Review Timeline

Phase 1 – Research Phase (early September to mid-October 2015)

Outcomes of research will be released on Ottawa.ca and distributed as a series of Discussion Papers

Phase 2 – Consultation Phase (mid-September to early November 2015)

¹⁷⁹ Exhibit 58, *supra* note 109, at p. F2730.

¹⁸⁰ *Ibid.*

There will be opportunities for input from all interested parties. Details will be provided shortly.

Phase 3 –Analysis and Reporting Phase (November and December 2015)

Analysis of research and stakeholder/public input will be undertaken and a draft report with recommendations will be prepared before the end of December 2015.

Get involved!

You can get involved in the Review by going to Ottawa.ca and subscribing to receive the Review's e-mail updates. You can also e-mail the Review at taxi@ottawa.ca or contact the City's Project Manager:

Taxi Review Project Manager

Emergency and Protective Services Department,

110 Laurier Avenue West, 5th floor, Ottawa ON K1P 1J1

613-580- TAXI (8294)

148. During the initial phase of the VFH Review, which focused on the development of the discussion papers, KPMG met with key stakeholders in the taxi industry – including Unifor, Coventry Connections, Blue Line and Metro – as well as Uber. These early consultations were focused on fact-finding, data gathering, and an initial understanding of the stakeholders' views.¹⁸¹

II) The discussion papers

149. KPMG's review began with a "research phase," involving the research and production of six discussion papers, which were published on the City's dedicated webpage throughout the month of October 2015.¹⁸² Several of these discussion papers are examined in greater detail below, but as an overview, the six discussion papers consisted of:

- (a) An October 1, 2015 KPMG paper entitled "Case Studies," examining how various large cities outside of Ottawa dealt with the emergence of ride-sharing services;

¹⁸¹ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 25, line 32 – p. 26, line 22.

¹⁸² Exhibit 59, *supra* note 103, at p. F2787

- (b) An October 9, 2015 Hara Associates paper entitled "Current Regulatory Regime," which explains key elements of the then-current VFH regulatory regime, and the practical function of the industry in Ottawa;
- (c) an undated Hara Associates paper entitled "Taxi Economics — Old and New," which discusses the economics of regulatory issues surrounding the taxi industry and the economic impact of ridesharing services, including on plate values;
- (d) An October 14, 2015 Core Strategies paper entitled "Customer Experience," providing an overview of the results of focus groups of sample VFH customers in Ottawa;
- (e) An undated KPMG paper entitled "Accessibility', discussing various modes of accessible public transportation in Ottawa; and
- (f) An undated Mowat Centre paper entitled "Emerging issues in the Taxi and Limousine Industry, which discusses current and emerging policy approaches, market performance, and service impacts of new business models both in Ottawa and more broadly.¹⁸³

150. As Mr. Bourns explained, the purpose of beginning the VFH Review with discussion papers was to ensure that all stakeholders had a baseline understanding of the key issues and “would be able to provide their input and response based on the same factual circumstances.”¹⁸⁴ This echoes the evidence of Ms. Donnelly, who described the purpose of the discussion papers as follows:

Q. Okay, and why was it important that discussion papers be commissioned?

A. Well, you want to involve all stakeholders, including the general public, but impacted stakeholders, taxi and limousine licensees that we currently regulate, accessibility community, as much as you can get them, the, the people involved in the alternative service industry, which in this case was Uber. You want to involve them early and often in the discussion of matters that concern them directly. And so, so that you can receive their feedback directly, and let that inform your, your next phase and your thinking.¹⁸⁵

¹⁸³ Exhibit 59, *supra* note 103, at pp. F2787-8.

¹⁸⁴ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 24, line 29 – p. 25, line 3.

¹⁸⁵ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 84, lines 21-31.

151. The elements of the discussion papers that are most relevant to the issues before this Court are summarized below. The papers are relevant as a record of the information that was before the City and the public.

(1) Case Studies

152. The Case Studies discussion paper was prepared by KPMG, and examined the then-current status of the VFH industry in jurisdictions outside of Ottawa, including how those jurisdictions reacted to the emergence of alternative service delivery models. The study of the regulatory responses of other municipalities to these alternative models was required by the RFP, and was intended to provide insight into how these jurisdictions had dealt with key regulatory issues including insurance requirements, potential limits on the number of ridesharing vehicles, and whether and how they were to be licensed.¹⁸⁶

153. The paper included a table summarizing the regulatory responses of various municipalities as of October 2015:¹⁸⁷

¹⁸⁶ Exhibit 110, *supra* note 101, at p. F1072; Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 27, lines 7-21.

¹⁸⁷ Exhibit 112, Case Studies discussion paper, p. F2987.

City	Toronto	Waterloo	Montreal	Edmonton	Vancouver	New York	Chicago	Boston	Washington DC	San Francisco
Case Study	X	X			X	X			X	X
New Licensing Category*	Proposed	Proposed	No	Proposed	No	Yes	Yes	Yes	Yes	Yes
Insurance Requirement	\$2M	\$2M	N/A	Yes	N/A	Yes	Yes	\$1M	\$1M	Yes
Police Check of drivers	Yes	Yes	N/A	Yes	N/A	Yes	Yes	Yes	Yes	Yes
Mandatory Training of drivers	Yes	Yes	N/A	No	N/A	No	Yes	No	Yes	Yes
Commercial Driver's License required	No	Yes	N/A	Yes	N/A	Yes	N/A	Yes	No	No
Restriction on Vehicle Age?	No	No	N/A	No	N/A	6 years	6 years	No	10-12-years	No
Restriction on Vehicle Size	No	No	N/A	No	N/A	N/A	Yes	No	No	No
Identification Markings required	Yes	No	N/A	Yes	N/A	No	Yes	No	No	No
Cameras required	Yes	Yes	N/A	No	N/A	No	No	No	No	No
Street Hails Permitted	No	No	N/A	No	N/A	No	N/A	N/A	No	N/A
Vehicle Inspection	Yes	Yes	N/A	If directed	N/A	Yes	N/A	N/A	Yes	No
Fare specified	No	No	N/A	No	N/A	No	No	No	No	No
Per fare levy	No	No	N/A	No	N/A	Yes	Yes	No	Yes	No
Accessible Service required	No	No	N/A	No	N/A	Levy	Levy,	No	Yes,	No

154. Of the jurisdictions surveyed, only Montreal and Vancouver had not established or proposed a new licensing category for ridesharing services, distinct from the licensing of taxis, as of October 2015. Both municipalities subsequently established separate licensing categories for ridesharing services, and those services are currently licensed in both Montreal and Vancouver – again, under a licensing category distinction from the licensing of traditional taxis.¹⁸⁸

¹⁸⁸ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 32, lines 9-16.

155. Furthermore, all three of the municipalities that proposed separate licensing categories for ridesharing services – Toronto, Edmonton and Waterloo – now permit the operation of ridesharing services, under a separate licensing category from taxis.¹⁸⁹

156. Indeed, as of today, none of the jurisdictions surveyed in the Case Studies paper prohibit the operation of ridesharing services. All of the jurisdictions surveyed, with the exception of New York City, have established a licensing category for ridesharing that is separate from the licensing category for taxis. None of these jurisdictions regulate the fares that ridesharing services may charge. New York City licenses ridesharing services under a subcategory of taxi licensing distinct from standard taxis that predated the operation of Uber, and which does not limit the number of ridesharing vehicles permitted to operate.¹⁹⁰

(2) Emerging Issues in the Taxi and Limousine Industry

157. This discussion paper was authored by the Mowat Centre, and provides an overview of emerging ridesharing technologies, including their business models, and explores their impacts on VFH services and markets. It also explores emerging policy approaches to these new technologies, and their economic implications.

158. The paper focuses on Uber, as it was, as of October 2015, the only ridesharing company to have reached significant scale in the Ottawa and Canadian markets. The paper describes the “key features” of Uber’s business model, which are generally consistent across other ridesharing apps, as follows:

- **Technology** - Customers, using their GPS-enabled smartphones, order a car for pick-up and then track its progress, reducing and improving the predictability of wait times and also making it easier to order a ride when the pick-up address isn't known. The firms' underlying technology also facilitates provision of fare estimates before a ride is accepted and ensures immediate matches between drivers and passengers. The interface of ride-sharing applications is streamlined and straightforward, and in most cases two to three taps on a smartphone are all that is required to arrange a ride, with no need to speak to a live dispatcher.

¹⁸⁹ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 112, line 29 – p. 113, line 14; p. 114, lines 17-22;

¹⁹⁰ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 32, line 31 – p. 33, line 24.

- **Reputational rankings** - Both drivers and passengers rate each other on a 5-star scale after a ride. This mechanism gives both drivers and passengers a better sense of whether they want to be matched with each other, as they can rely on the judgements of those who have previously traveled with the same person.
- **Payment** - Credit cards are kept on file and charged at the conclusion of a ride, which means there is no need to carry cash (or, as critics would point out, passengers are required to have a credit card) and passengers are e-mailed receipts at the conclusion of a ride.
- **Fares** - Ride-sharing service prices are generally lower than the regulated fares that taxis and limos must charge, both in terms of minimum rates and distance/time-travelled rates. However, in order to increase the number of drivers during periods where demand outstrips supply, Uber relies on surge-pricing (Lyft calls this 'Prime Time'), which can dramatically increase the fare charged to passengers and has been subject to criticism as a form of price-gouging during transit shutdowns or unforeseen events.¹⁹¹

159. As demonstrated by the Case Studies paper, Ottawa's experience with Uber was not unique. This is underscored by the Emerging Issues paper, which highlighted that as of October 2015, Uber was operating in more than 300 cities worldwide.¹⁹² Further reinforcing the conclusions of the Case Studies paper, the Emerging Issues paper identified that more than 20 U.S. states and cities had introduced legislation to establish a licensing category for ridesharing services that was separate from licensing for taxis:

Transportation Network Company legislation: More than 20 U.S. states, including Illinois, Nevada, Massachusetts and California, and a similar number of cities, have introduced 'Transportation Network Company' legislation or by-laws to recognize the existence of ride-sharing firms like Uber, Lyft and Sidecar as a distinct entity from traditional taxi services. These rules, which are broadly similar in nature across jurisdictions, require companies to purchase a license in a new "TNC category, obtain liability insurance and conduct background checks on prospective drivers. The City of Toronto's licensing staff recently recommended the creation of a new regulatory regime for TNCs in the city.¹⁹³

160. The paper also highlighted two recent surveys of Uber users that had taken place in Ottawa and Toronto, respectively. While the City concedes that the truth of these cited surveys was not established

¹⁹¹ Exhibit 44, Mowat Centre Report, October 2015, pp. F3051-2.

¹⁹² Exhibit 44, *Ibid*, at pp. F3054

¹⁹³ Exhibit 44, *Ibid*, at pp. F3058.

at trial, it is nonetheless relevant as an example of the information that was put before stakeholders and decision-makers through the VFH Review. The paper states:

The company launched its UberX service in Ottawa in October 2014. In the short time since its introduction, Uber has reached a significant level of awareness amongst Ottawa residents. According to an August 2015 Nanas survey (commissioned by Uber) of 400 Ottawa residents:

- Overall, 98 per cent of residents have heard of Uber, while 60 per cent have a positive or somewhat positive impression of the company.
- Most respondents - 84 per cent - support or somewhat support the City developing new by-laws to permit Uber to operate while only 12 per cent of residents oppose or somewhat oppose this idea.

A recent survey by Ipsos Reid, conducted for the City of Toronto (where UberX started operating in September 2014), sheds some light on perspectives that are instructive for the Ottawa market:

- Uber services were used by 21 per cent of Toronto residents in the past year, and 12 per cent use UberX at least once a month. By comparison, 58 per cent of residents have taken a licensed taxi in the past year, and 28 per cent use taxis at least once a month.
- Satisfaction amongst Toronto residents with Uber (65 per cent) and limos (61 per cent) is high, while 29 per cent are satisfied with taxi service and 38 per cent with public transportation.
- Respondents cited lower costs when compared to taxis and the ease of the mobile app experience as their main reasons for using Uber. Insurance coverage is perceived as the most significant weakness for the service and there is confusion amongst residents about what type of coverage exists.¹⁹⁴ [*emphasis added*]

161. As a method of quantifying the improved service offered by Uber, the paper included the following table:¹⁹⁵

¹⁹⁴ Exhibit 44, *Ibid*, at pp. F3054-5.

¹⁹⁵ Exhibit 44, *Ibid*, at p. F3057.

	Toronto	Ottawa
Licensed Drivers	10,000	2,600
Licensed Cabs (accessible)	5,000(500)	1,188 (187)
Uber Drivers	13,000	1,000
Daily Licensed Cab Trips	65,000	27,400
Daily UberX trips	17,000	Unavailable
Average response time - Taxi	9 minutes	5 -15 minutes depending on location
Average response time - Uber	2-4 minutes	3.7 minutes

Sources: City of Toronto, City of Ottawa, Uber, Coventry Connections

162. Finally, the Emerging Issues paper underlined the benefits of new ridesharing services for both drivers and users. Regarding the latter, the paper concludes that “consumers likely stand to reap the most benefits from the ride of app-based ride-sharing services, as they offer more choice and the potential for better service...”¹⁹⁶ In terms of the former, Mowat highlighted that ridesharing services provide “significant flexibility” for drivers, “in terms of when to work and how much to work,” in comparison to traditional taxis, in which the driver must generally pay an up-front fee to rent a plate either daily, weekly or monthly.¹⁹⁷ It states:

Uber, Lyft and other ride-sharing firms also provide drivers an alternative to the expensive leasing and licensing fees of the taxi system, such as the acquisition of taxi plates or the need to pay a rental fee to drive a licensed cab. This aspect of the taxi system has generally benefited plate owners, giving them significant control over entry into the market, but has made the economics of cab-driving difficult and expensive for drivers who do not own a plate.¹⁹⁸ [*emphasis added*]

163. Notably, Mr. Mail, who formerly rented a taxi plate, agreed with the Mowat Centre’s assessment:

MR. BURKE: Q. All I'm trying to establish, Mr. Mail, is that you know there have been a number of taxi drivers that have now gone over and moved to, drive for Uber. Do you agree with that?

A. I said, yes, I agree with you.

Q. Right. And one of the reasons that they've done so is that it, the expenses are less?

A. That's right.

Q. And they're not paying them upfront?

¹⁹⁶ Exhibit 44, *Ibid*, at pp. F3063.

¹⁹⁷ Exhibit 44, *Ibid*, at pp. F3061.

¹⁹⁸ Exhibit 44, *Ibid*, at pp. F3062.

A. No.

Q. Right? And they, they can work part-time?

A. Exactly.

Q. And they have more flexibility. Correct?

A. You're right.

Q. And they can spend more time with their family?

A. That's all you saying. Yes.¹⁹⁹ [*emphasis added*]

(3) Customer Experience

164. The Customer Experience paper was prepared by Core Strategies, and was based on a series of three focus groups conducted among a sample of VFH customers in Ottawa. Core Strategies described its methodology as follows:

Respondent Selection: Focus Group participants were recruited from the adult general population in Ottawa. Panel and random-digit dial participants were quota-targeted and screened on demographic and other criteria pertinent to the study including but not limited to; Gender, Age, Education, Occupation, and Income.

- Focus Group participants were screened on the basis of frequency of vehicle for hire use. ~80% of the recruits had to have used Taxis and/or Uber in Ottawa a minimum of 3-5 times in the past three months.
- Focus groups were age delimited as follows: Group 1 (17-29 Years), Group 2 (30-45 years), Group (46-75 years).
- 12 Focus group respondents were recruited per group for a total of 36 participants.

Discussion Guide: Focus groups were 90 minutes in length and followed a discussion guide focusing on the customer experience as it relates to:

- Experience using Taxis/limo
- Experience using Uber
- Differences in experience: Taxi vs. Uber
- Current debate between Taxi & Uber
- Focus group participants also completed a brief survey to assess any changes in their frequency of vehicle for hire use and to provide performance ratings on 14 vehicle for hire service attributes, including their respective importance in the customer experience.²⁰⁰

¹⁹⁹ Iskhak Mail, Cross-Examination, January 19, 2023, *supra* note 26, at p. 128, line 30 – p. 129, line 13.

²⁰⁰ Exhibit 114: Customer Experience discussion paper, p. F3123.

165. Based on the focus groups, Core Strategies assigned each of Uber and taxis scores out of 10, across a range of different criteria. The paper summarized those scores as follows:²⁰¹

Attribute	Performance Ratings									Importance		
	Total (All participants)			Men			Women			Total	Men	Women
	Taxi	Uber	Diff	Taxi	Uber	Diff	Taxi	Uber	Diff			
Experience										Vehicle for hire		
Cost	3.9	9.1	5.2	4.6	8.8	4.2	3.2	9.4	6.2	9.6	9.2	10.0
Convenience using App	5.1	9.4	4.3	6.6	9.3	2.7	2.0	9.5	7.5	7.9	8.3	7.4
Payment Process	6.0	9.6	3.6	5.9	9.6	3.7	6.0	9.5	3.5	8.5	8.6	8.4
Driver Courtesy	5.6	8.7	3.1	5.9	8.8	2.9	5.2	8.5	3.3	7.7	7.3	8.1
Wait Times	5.8	8.8	3.0	6.2	8.5	2.3	5.8	9.1	3.3	8.9	9.0	8.8
Driver Professionalism	5.5	8.3	2.8	5.7	8.3	2.6	5.3	8.3	3.0	8.2	7.8	8.5
Vehicle Comfort	6.4	8.2	1.8	6.8	8.2	1.4	5.9	8.3	2.4	7.4	7.4	7.5
Vehicle cleanliness	7.1	8.5	1.4	6.9	8.7	1.8	7.2	8.3	1.1	8.2	8.4	8.1
Functionality in other cities	7.5	8.4	0.9	8.2	8.4	0.2	6.6	8.5	1.9	7.0	6.8	7.3
Travel Time / Arriving on time	7.4	7.9	0.5	7.7	7.4	-0.3	7.2	8.4	1.2	9.0	9.0	8.9
Feeling safe and secure	7.6	7.8	0.2	8.4	7.8	-0.6	6.9	7.9	1.0	9.2	8.8	9.6
Vehicle Safety	7.5	7.7	0.2	7.8	7.8	0.0	7.3	7.7	0.4	9.1	9.0	9.2
Knowledge of the route	7.9	7.9	0.0	8.6	7.9	-0.7	7.2	7.9	0.7	8.8	8.8	8.8
Vehicle is properly insured	9.0	6.1	-2.9	9.1	5.9	-3.2	8.9	6.3	-2.6	8.5	8.1	8.9
Average	6.6	8.3	1.7	7.0	8.2	1.2	6.1	8.4	2.4	8.4	8.3	8.5

166. Based on those scores, Core Strategies identified a number of key findings, including that:

- (a) “The research found resoundingly higher customer service and customer experience ratings for Uber over Taxi. Leading the way are impressions about the lower cost of using Uber as well as significant advantages of the Uber App as compared to Taxi Apps.”
- (b) “Focus group participants also rate Uber more favourably on numerous other customer experience attributes including but not limited to; shorter wait times, faster travel times, driver courtesy and professionalism, vehicle comfort and cleanliness, safety and security. However concerns about Uber arise on matters such as vehicle insurance and taxation.”

²⁰¹ Exhibit 114, *Ibid*, at p. F3135.

- (c) The most important factors criteria for participants were cost, convenience, personal safety, and security.
- (d) There was a notable gender gap, with women showing much stronger preferences for Uber, and rating it higher on all categories except vehicle insurance.
- (e) Participants were generally aware and highly supportive of the reviews of ridesharing technologies taking place at that time in many Canadian municipalities. The most commonly desired outcomes of those reviews included:
 - i. “New rules, policies, and regulations that allow both Taxi and Uber to operate.”
 - ii. “Continued lower fares as a result of competition, although most believe Uber costs will increase as regulatory issues are resolved.”
 - iii. “That all vehicle-for-hire agencies be regulated in terms of safety and security standards.”²⁰²

(4) Accessibility

167. This discussion paper was prepared by KPMG, and reviews the types of public transportation available in Ottawa for mobility impaired persons, including accessible buses, Para Transpo, accessible taxicabs, and subsidized taxi coupons. Key findings from this paper include the following:

- (a) The City of Ottawa began issuing accessible taxicab plates in 2002, and as of October 2015 had issued 187 accessible plates. These plates were all issued by lottery to drivers that had completed the required training program and placed themselves on an eligibility list.²⁰³

²⁰² Exhibit 114, *ibid*, at pp. F3122, 24 and 34.

²⁰³ Exhibit 115, Accessibility discussion paper, *supra* note 22, at pp. F3076-7.

- (b) Accessible plates were issued by the City for \$1, and are transferable to a new plate license holder after five years.²⁰⁴
- (c) Ottawa has a high proportion of accessible taxicabs in comparison to other municipalities. 16% of Ottawa's taxi fleet is accessible, in comparison with 5% of the fleet in Montreal; 8% in Edmonton; 7% in Seattle; 6% in Boston; 2% in Chicago and 1% in New York City. Vancouver is the only municipality identified with a proportion of accessible taxis comparable to Ottawa.²⁰⁵
- (d) Accessible taxicabs must give priority to calls from mobility impaired persons. At all other times, they are permitted to operate in the same manner as standard taxicabs. The paper states that "Coventry Connections reports that on average each accessible taxicab (in their fleet) provides service to a mobility impaired person once every two days when it is not under contract to Para Transpo."²⁰⁶
- (e) As of October, 2015, both Coventry Connections and Westway were operating under contract with Para Transpo (the branch of OC Transpo dedicated to serving users with limited mobility), providing at least 80 taxis for service as needed. When operating under contract work, the driver is paid the metered rate, while the dispatcher is paid a 15% surcharge. The paper states that the total annual cost of this contract work to Para Transpo is approximately \$9 million.²⁰⁷ On cross-examination, Mr. Way confirmed that this contract work is ongoing for up to 80 accessible taxis, and that the surcharge is now 11%. His evidence was that this surcharge is paid to Para Logistics, a subsidiary of

²⁰⁴ *Ibid.*

²⁰⁵ Exhibit 115, *Ibid.*, at pp. F3083.

²⁰⁶ Exhibit 115, *Ibid.*, at pp. F3081.

²⁰⁷ Exhibit 115, *Ibid.*, at pp. F3078-9.

Coventry Connections. Even though Mr. Way is the CEO of Coventry Connections, he could not approximate the quantum of revenue that this surcharge generates.²⁰⁸

- (f) An additional exclusive revenue stream for accessible taxis is the Taxi Coupon Program, administered by Para Transpo. This program allows Para Transpo customers to purchase discounted coupons that may be used to pay for their taxi rides, with the taxi driver receiving the full face value of the coupon to pay for the fare. In 2014, the total face value of taxi coupons sold by Para Transpo was \$658,080.²⁰⁹ Uber does not have a taxi coupon program.²¹⁰
- (g) Uber generally does not offer wheelchair-accessible service.²¹¹

168. As Uber generally does not offer wheelchair accessible service, the market for that service, along with Para Transpo contract work and the Taxi Coupon program, remain exclusive revenue streams for accessible plate license holders.

(5) Taxi Economics – Old and New

169. This discussion paper, authored by Hara Associates, was intended to “explain the economics of regulatory issues surrounding the industry, and the impact of App Based Service Models (ABSMS) like Uber and Lyft.” As the plaintiffs acknowledge, it put topics including “taxi plate values” and “driver incomes” front and centre.²¹² The paper describes plate values as “plate holder rights” that are “transferred between private parties for amounts in the hundreds of thousands of dollars.”²¹³

170. The paper explains that municipalities have generally capped taxi numbers so as to avoid potential threats to public safety and consumer protection arising from excess entry.²¹⁴ However, it also

²⁰⁸ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p.129, line 30 - p. 134, line 17.

²⁰⁹ Exhibit 115, *supra* note 22, at pp. F3080.

²¹⁰ Marc André Way, Cross-Examination, January 17, 2023, *supra* note 122, p. 3, lines 7-9.

²¹¹ Exhibit 115, *supra* note 22, at pp. F3084.

²¹² Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 156; Exhibit 55, *supra* note 28, at p. F3090.

²¹³ *Ibid.*

²¹⁴ Exhibit 55, *supra* note 28, at p. F3090.

highlighted that plate limits, which are the basis for the value of plates on the secondary market, often create negative knock-on effects:

Despite its valid policy origins, limiting taxi numbers as a concept has a poor reputation. 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 (termed plate, medallion, license, or roof light depending on the jurisdiction).

While each taxi may be busier and more efficient in the technical sense, this is not a social gain. Either customers must wait longer for these busy taxis or, the regulator must let meter rates rise to reduce demand to available capacity. In either case, the market for taxi services is constrained and customers end up with poorer and/or more expensive service.²¹⁵

171. Hara added that “High plate values can also signal deeper problems related to an undersupply of taxis”, including poor service in peak hours, underserved areas, and the collapse of suburban markets.²¹⁶ Having set out the context, the paper goes on to make several key points regarding plate values, and the potential impact of the establishment of a new licensing category for ridesharing services:

- (a) Plate values can, and have, increased or decreased depending on regulatory changes. For example, when the previously separate taxi zones of the Predecessor Cities were merged into a single taxi zone following amalgamation, the secondary market value of taxi plates for the Former City of Ottawa decreased, whereas the values for taxi plates issued by the Predecessor Cities increased.²¹⁷
- (b) Only 26% of taxi drivers in Ottawa are plate holders, and only 56% of plates are held by single individuals.²¹⁸

²¹⁵ Exhibit 55, *supra* note 28, at pp. F3092-3.

²¹⁶ *Ibid.*

²¹⁷ Exhibit 55, *supra* note 28, at pp. F3094.

²¹⁸ Exhibit 55, *supra* note 28, at pp. F3097.

- (c) Many plate holders acquired their plates at below market prices, or at nominal value, including those who acquired accessible plates from the City of Ottawa for \$1. It is not known how many plate holders acquired their plates at or near peak market value.²¹⁹
- (d) Within this context, the entry of ridesharing services into a market is likely to lead to a decrease in the secondary market value of plate licenses, which raises concerns of fairness.²²⁰

172. Like the Mowat Centre, Hara Associates also highlighted that Uber affords increased flexibility for drivers in comparison to traditional taxis, and is more accommodating of part-time work. Hara stated that drivers are likely to switch to Uber for this reason, as well as to avoid the high costs of plate leasing.²²¹ Further, echoing the Mowat Centre and Core Strategies, Hara found that Uber and other ridesharing services have generated significant customer enthusiasm through their new service features including: ease of ride requests and GPS tracking of the ride; ease of payment; and the driver rating system.²²²

III) The consultation phase

173. Following the release of the discussion papers, KPMG held a series of seven workshops open to the public, which were publicized through the City's dedicated webpage, as well as through its social media channels. The workshops were attended by a total of 66 people, of whom 26 were members of the taxi industry – including plate holders and current and former drivers. Seven attendees of the workshops were Uber drivers, and 33 were members of the public, including customers of VFH services and members of the accessibility community.²²³

174. Printouts of the discussion papers were available at the workshops. Each workshop lasted approximately two hours, and was based around structured discussions. Workshops were conducted in

²¹⁹ Exhibit 55, *supra* note 28, at pp. F3094

²²⁰ *Ibid.*

²²¹ Exhibit 55, *supra* note 28, at pp. F3095 and 97-98.

²²² Exhibit 55, *supra* note 28, at pp. F3098-9.

²²³ Exhibit 58, *supra* note 109, at p. F2730.

both English and French, and were led by KPMG, who recorded feedback from attendees. The feedback was ultimately incorporated into KPMG's analysis for the Policy Options paper. None of the workshop attendees raised any concerns regarding discrimination on the basis of personal characteristics, the *Charter*, or the *Ontario Human Rights Code*.²²⁴

175. During this phase of its review, KPMG also held further meetings with key stakeholders, including with Unifor, Coventry Connections, Westway and Uber. KPMG collected feedback from these meetings, which was ultimately incorporated into its analysis for the Policy Options paper.²²⁵

176. During this phase of the review, more than 6,000 comments were received from members of the public, through the City's dedicated email address and telephone hotline.²²⁶ The City forwarded these comments to KPMG, typically in the form of spreadsheets, and KPMG ultimately incorporated them into its analysis.²²⁷

177. KPMG also received some submissions directly. By way of example, on October 22, 2015, Coventry Connections provided a highly detailed, 32 page submission directly to KPMG.²²⁸ Mr. Way, who was the Chief Operating Officer of Coventry Connections at the time, was involved in the development of the document.²²⁹ The submission is structured in two parts: Part I makes the case for enforcing a ban on Uber, while Part II contains 33 specific policy recommendations for regulation of Uber, in the event that it is not banned altogether.²³⁰ The incorporation of Coventry Connections' policy recommendations into KPMG's Final Report and the 2016 Staff Report is discussed in greater detail below.

²²⁴ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 63, line 10 – p. 65, line 16.

²²⁵ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 66, line 12 – p. 67, line 29.

²²⁶ Exhibit 59, *supra* note 103 p. F2788.

²²⁷ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 61, lines 16 -31.

²²⁸ Exhibit 24, Coventry Connections submission to KPMG, October 22, 2015, p. F132.

²²⁹ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 44, lines 5-9.

²³⁰ Exhibit 24, *supra* note 228, at pp. F134, and F153-62.

IV) *The Policy Options paper*

178. The second phase of KPMG's review culminated in its publication of the Policy Options paper on November 18, 2015. Like the discussion papers, it was published on the City's dedicated webpage.

The introduction of Policy Options paper describes its purpose as follows:

As a result of emerging issues, new technologies, and non-traditional service models (e.g. app-based models such as Uber), a complete and thorough review of Ottawa's taxicab and limousine industries, as well as the existing regulatory framework, is necessary to determine if they meet the needs of residents and visitors.

As part of the review, KPMG met with various stakeholders including taxi drivers, taxi brokers, taxi driver union representatives, Uber representatives, customers of both taxis and Uber, and providers of accessible service including taxis and Para Transpo. KPMG and its partners also conducted extensive research on the taxi industry and released six discussion papers. Through this process, a number of key findings were identified and are outlined in the next section. Based on the findings and on the input from review participants, KPMG has identified different approaches that the City may consider. This document does not repeat all the background information and analysis provided in the six discussion papers, but does draw on the information presented in those discussion papers.

The policy options included in this discussion paper are ideas for consideration. In some cases, the preferred approach is quite evident, but in most areas it is not yet clear what approach is most appropriate. KPMG will be seeking feedback from all interested parties with respect to these policy options in order to ensure that our final report can accurately identify the key implications of each option. The final decision regarding the future regulatory framework remains the responsibility of City Council.²³¹ [*emphasis added*]

179. The paper summarized KPMG's key findings through the first two phases of the review, which included the following:

- The introduction of UberX services to Ottawa has met a customer need, attracting customers primarily based on a lower price, and the features of its app, which includes quicker and more predictable pick-ups, the driver rating system, which seems to produce more driver courtesy and professionalism, and the ability to pay easily by credit card or debit (through PayPal). Most users participating in the research or consultation processes, like using Uber much better than taxis.
- Taxi plate market values seem to have risen substantially over the decade before Uber's launch, even though 187 accessible plates were issued by the City starting in 2003, with most going into circulation in 2007 through to 2010. The majority of Ottawa plate owners have held their plates for a long time, with only 25 plates per year being transferred, on average. Most acquired their plates when they were far

²³¹ Exhibit 56, *supra* note 67, at p. F3145.

less expensive, or in the case of accessible plate holders, they received their plates recently for a modest fee.

- The lack of clear insurance coverage is the largest public/customer hesitation with Uber. Although Uber vehicles do not have the cameras found in taxis, women reported feeling safer using Uber - and rated safety the second most important service characteristic (after price).
- Ottawa has a very strong accessible taxi industry. Uber does not provide any accessible service in Ottawa, or in most cities in which it operates, although it has introduced some services in some cities.²³² [*emphasis added*]

180. The Policy Options paper recommended three strategic options for integrating new businesses like Uber into the City's VFH regulatory regime, and suggested that these businesses be called "Transportation Network Companies (TNCs)." KPMG noted that Uber did not fit into the existing regulatory model for taxis, and that it was operating without regulatory oversight and in contravention of the 2012 By-law, but with considerable customer support. The paper states:

Going forward, continuing a substantial Uber operation outside the regulated environment is not an option. Similarly, continuing the operation of the taxi industry in its current form should not be seen as an option either. Uber has demonstrated that vehicle for hire services can be much better than the services the taxi industry has been providing in recent years.²³³ [*emphasis added*]

181. The Policy Options paper proposed three non-mutually exclusive regulatory strategies intended to improve services for consumers while maintaining the City's goals of public safety, consumer protection, and accessibility.²³⁴

182. Strategy A involved reform of the current taxi industry by members of the industry itself, including "dispatching the closest vehicle to improve response times", and "allowing competition between taxi groups offering reduced fares in some, or all, circumstances". The Policy Options paper noted that factors within the taxi industry itself were the primary barriers to this form of innovation:

This approach may produce some improvements in customer service within the taxi industry, but it may be difficult to achieve significant change to the existing industry with

²³² Exhibit 56, *supra* note 67, at p. F3147.

²³³ Exhibit 56, *supra* note 67, at p. F3148.

²³⁴ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 73, lines 5-11.

the collective agreement limiting innovation to improve customer service, and with a small number of inter-related brokerages limiting competition.²³⁵ [*emphasis added*]

183. Strategy B recommended the establishment of a new licensing category for TNCs. The proposed features of this strategy included:

- Drivers operating under a TNC would not be permitted to use taxi stands or to pick up street hails (cannot be flagged down).
- The TNC and its drivers would be required to meet various screening requirements (police record checks for work in the vulnerable sector) and would be required to carry proper insurance.
- TNCs would be required to include many of the positive aspects of Uber's service, recognizing other operations could also be set up in this category.
- Where appropriate, regulations could be tailored to "level the playing field" between the TNCs and taxis with a combination of new regulations for TNCs and changes in taxi regulations.²³⁶ [*emphasis added*]

184. Strategy B largely reflected the approach taken by the various U.S. jurisdictions identified by the Mowat Centre in its Emerging Issues paper and the various jurisdictions studied by KPMG in the Case studies paper.

185. Strategy C considered entirely removing the limit on the number of plates issued in the City of Ottawa, which would allow anyone who met the qualifications under the by-law to obtain a taxi plate. KPMG found that although this option would reduce taxicab driver costs, it would also lead to the introduction of more taxis entering the industry and would lower driver incomes. KPMG reasoned that the elimination of the taxi plate limits alone may not bring existing services like Uber into compliance with the regulatory environment.²³⁷

186. Like the Taxi Economics paper, the Policy Options paper explicitly considered the issue of plate values, and the potential impact of regulatory changes on those values. KPMG understood that any type of regulatory change would have an impact on plate license values, and that it was important to the

²³⁵ Exhibit 56, *supra* note 67, at p. F3149.

²³⁶ Exhibit 56, *supra* note 67, at pp. F3149-50.

²³⁷ Exhibit 56, *supra* note 67, at p. F3150.

review to identify those implications.²³⁸ The paper notes that during the consultation process, some plate holders had threatened to claim against the City for damages if the City enacted a new licensing category for Uber and similar services.²³⁹ Mr. Bourns confirmed that this threat had been articulated during the consultation process by Coventry Connections and other brokers, along with individual plate license holders that had attended the workshops. The basis articulated for the threatened claim was a reduction in plate values, rather than violation of the *Charter* or the *Ontario Human Rights Code*.²⁴⁰

187. The paper also has an entire section devoted to plate values, which highlights several aspects of this phenomenon, including that: (1) plate value stems from private transactions conducted without the involvement of the City; (2) high plate values generally benefit plate license holders, and create high barriers to entry for those that must rent or lease plates; and (3) the value of plate licenses stems from the fact that they represent access to a legal monopoly, and plate license holders will find a way to realize that value, even if transfers are prohibited:

Limiting the number of plates issued results in the plates having a value when they are transferred from one individual to another. Fifteen plate transfers have been reported to the City over the last year. Some have occurred for nominal value between related parties. The others have been transferred for values ranging from \$100,000 to \$250,000. Note that these are payments between individuals in the industry. The City is not involved in the transaction, although it does charge a fee to record the change. These high plate values create a barrier for entry to new entrants into the market, limiting the ability of new participants to join the industry during times of high unemployment. It also results in high fees charged to drivers who need to "lease" a plate, with fees ranging from about \$750 per month to as much as \$1,500 per month, according to drivers participating in the consultation process. Some drivers paying to lease plates expressed the feeling that these costs contribute little or nothing to the industry, ultimately leading to lower income for taxicab drivers. However, plate owners have invested to join the industry, and believe the value of that investment should be protected, whether they are active drivers or not.

Cities have tried various approaches to controlling the transfer of plates and to prevent the sale of plates at these high prices. The City of Ottawa did require the new accessible plates issued in 2007 to be restricted to "single plate owners" and prohibited the transfer of plates, but that was changed in the 2012 by-law amendments to allow transfers. It is very difficult to limit the transfer of the plate value, once it exists. The City could require transfer of the plate for \$1, but how could the regulator prevent a simultaneous transaction, perhaps the sale of the car attached to the plate, for \$200,000 or whatever the market value is? The union agreement limits the lease rate that multiple plate holders can achieve,

²³⁸ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 82.

²³⁹ Exhibit 56, *supra* note 67, at p. F3150.

²⁴⁰ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 77, lines 7-24.

but that has only created a second class of interests in the plate. Those entitled to lease the plates at the preferred rate have been reported re-leasing the plates at the market value, and even selling the right to lease the plate at fees reported during the consultation process to be as high as \$100,000.²⁴¹ [*emphasis added*]

188. The Policy Options paper goes on to identify various key issues within the categories of each of the three guiding principles of public safety, accessibility and consumer protection, highlighting different options for regulation going forward. The paper also notes the differences between taxi and Uber services. By way of example, under the category of public safety, KPMG stated:

5.1 Public Safety

Public Safety can be achieved under any of these strategies by adopting appropriate regulations, such as insurance requirements and protective measures such as panic buttons, cameras etc., as appropriate. Ensuring the safety of the public is a key reason for preventing or controlling "bandit" or unlicensed taxis from operating. However, the approach to ensuring public safety could be tailored to the circumstances. For instance:

- Taxis accept both pre-arranged customers and street hails/cab stand customers. Thus, the driver and the passenger will not be known to each other, or to anyone else after the fact if an event occurs. Further, taxi drivers accept payment by cash.
- In the TNC context, both the driver and the passenger - and a third party (the TNC) know the identity of the driver and the passenger, and the rating systems provide some information about the other party before they meet. TNC drivers do not accept payment by cash.

Thus, the risks are different, and the appropriate measures to ensure public safety may be different.²⁴² [*emphasis added*]

V) Consultation following the Policy Options paper

189. After the Policy Options paper was published, KPMG offered two webinars – in English and French – that summarized the Policy Options paper.²⁴³ The French webinar was cancelled after no participants signed up. Participants in the webinar could submit comments and questions to KPMG, which were incorporated into the VFH Review.²⁴⁴ The City's dedicated email address and telephone

²⁴¹ Exhibit 56, *supra* note 67, at p. F3162.

²⁴² Exhibit 56, *supra* note 67, at p. F3151.

²⁴³ Exhibit 140, KPMG Webinar Presentation – Policy Options, November 24, 2015, p. B-1-5850.

²⁴⁴ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 86, lines 12-31.

hotline remained open following the publication of the Policy Options paper, and members of the public continued to submit comments.²⁴⁵

190. Members of the plaintiff class continued to have a direct line of input to KPMG during this phase of the review.

191. After the release of the Policy Options paper, KPMG convened a round of meetings with key stakeholders, including Coventry Connections, Unifor, and Uber.²⁴⁶ On November 25, 2015, Coventry Connections' lobbyist, Jeff Polowin, sent an email to Ms. Jones stating, in part: "as you and I discussed on the telephone earlier this week, we met with the KPMG team the day before yesterday to discuss their latest document in the taxi by-law review process. " Mr. Polowin's email goes to reiterate the 33 detailed policy recommendations first outlined in Coventry Connections' October 24, 2015 submission to KPMG.²⁴⁷

192. Ms. Jones forwarded the email to Mr. Bourns, who replied the next day expanding on KPMG's consultation with Coventry Connections, and addressing the various concerns that were expressed in Mr. Polowin's email. His email to Ms. Jones states:

We did meet with representatives of Coventry Connections earlier this week and they did indeed express concern that the Options paper did not include all the options proposed by Coventry in earlier submissions. They were unable to identify a significant number of those items, so we subsequently examined the 33 specific suggestions included in the submission - and repeated in Mr. Polowin's email to you.

As you will have noted, many of these were in fact included as options in the Policy Options paper, although not always in the same words. 21 of them were advanced as options in whole or in part, and 5 more are required implicitly to implement options that are presented in the report. Of the 7 that were not addressed in the Policy Options document, one was not included because it is already covered by provincial legislation (distracted driving), one suggests details on how insurance requirements be arranged while the report focused on ensuring insurance be provided, and three cover matters at too fine a level of detail for inclusion in the consultation document, but are issues the final report may address.

²⁴⁵ Exhibit 59, *supra* note 103, at p. F2788.

²⁴⁶ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 85, lines 11-16.

²⁴⁷ Exhibit 201, Email chain between Jeff Polowin, Susan Jones, and Brian Bourns, dated November 25, 2015, p. F800.

That leaves two suggestions that were excluded for policy reasons. One was the suggestion that a limit be set on the number of TNC/ ABSM vehicles that can be operated. That approach would establish a new kind of plates with limited supply and a market value, a concept which has proven problematic in the taxi industry. It would also prevent any further TNCs from entering the market as the number suggested is much smaller than the number currently thought to be in service without licenses. This option was consciously not included.

The other idea not included was a suggestion that the TNC be responsible for ensuring their drivers submitted HST. We understand that this role is a responsibility of the federal government, not the City. But if the principle were accepted and generally applied, it could result in a requirement that taxi brokers ensure taxi drivers declare all of their income for HST and income tax purposes as well, which is certainly outside the current norms of the taxi industry. This option was also not included, although the payment of HST issue was clearly addressed in other ways.

We asked and Coventry agreed to provide further specifics on the particular issues underlying their concern, and we look forward to receiving them. In the meantime you should be aware that the Coventry submissions were carefully reviewed, and the vast majority of the concepts advanced were included as options in the Policy Options document.²⁴⁸ [*emphasis added*]

193. In his cross-examination, Mr. Way agreed that “some of your recommendations were picked up in the policy options paper,”²⁴⁹ and subsequently identified approximately 21 such recommendations.²⁵⁰

194. On December 9, 2015, Coventry provided a second submission to KPMG, which commented on the Policy Options paper and outlined Coventry’s remaining concerns. The letter outlines Coventry’s participation in the VFH Review up to that date, stating:

We are engaged in the review having met several times with the KPMG review team and have submitted a detailed document of our own, designed to inform and educate team members about our company, our industry and about serving the Ottawa market. In addition we commissioned a respected academic, Dr. Garland Chow, to conduct a study and prepare an industry report to provide KPMG with another, unbiased opinion about the taxi industry and Uber’s disruptive practices.

We also encouraged our suppliers and workforce to have a say in the review process. Taxicharger, which deals with many transportation companies has provided its opinions to KPMG. Unifor, the taxi drivers’ union has also provided insight.²⁵¹ [*emphasis added*]

²⁴⁸ Exhibit 201, *Ibid*, at pp. F798-9.

²⁴⁹ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 63, lines 27-30.

²⁵⁰ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 59, line 16 – p. 68, line 4.

²⁵¹ Exhibit 142, Letter from Coventry Connections to Brian Bourns, December 9, 2015, p. B-1-8545.

VI) KPMG's Final Report

195. The ultimate stage of KPMG's mandate for the VFH review involved the production of a final report, which was to provide "final recommendations for addressing public and stakeholder concerns and improving Ottawa's taxicab and limousine industry."²⁵² KPMG provided a draft of its final report to the City on December 16, 2015.

196. The production and request for draft reports in advance of a final report is standard practice for both KPMG and the City, respectively.²⁵³ While the City provided comments on the draft report, it did not ask KPMG to alter any of its recommendations – again, this is standard practice for the City.²⁵⁴

197. KPMG provided its Final Report on December 31, 2015. The report summarized the broad consultation that KPMG undertook, as follows:

As part of this process, KPMG met with certain key stakeholders several times throughout the three phases. These key stakeholders included the City, taxi brokers, the taxi drivers' union local, limousine operators and representatives of Uber (Uber being the only Transportation Network Company (TNC) currently operating in Ottawa). During the consultation process, KPMG also met with the public, including vehicle-for-hire users; taxi and Uber- drivers; with Para. Transpo representatives; the City of Ottawa Accessibility Advisory Committee; and representatives of the Conference Board of Canada.²⁵⁵

198. The executive summary outlined the Final Report's recommendations as follows:

Based on the guiding principles and the design guidelines, and informed by the broad based feedback from consultations and by the various research documents prepared as part of this engagement, it is clear that the status quo regulatory environment must be changed. This document recommends that the City should consider adopting reforms to the taxi and limousine industry as follows:

- That a new licensing category of Transportation Network Company (TNC) be created, and
- That the existing taxi and limousine regulatory framework be reformed to reflect emerging issues, new technologies and non-traditional service models.

²⁵² Exhibit 110, *supra* note 101, at p. F1073.

²⁵³ Brian Bourns, Examination in Chief, January 31, 2016, *supra* note 105, at p. 96, lines 11-17; Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 102, lines 5-12.

²⁵⁴ Brian Bourns, Examination in Chief, January 31, 2016, , *supra* note 105, at p. 97, lines 2-9; Leslie Donnelly, Examination in Chief, January 26, 2023 *supra* note 102, at p. 102, lines 5-12.

²⁵⁵ Exhibit 58, *supra* note 109, at p. F2731.

The suggested TNC licensing category could regulate the services of Uber in Ottawa (its existing UberX and UberXL services) and allow other TNCs to establish themselves, permitting customers to continue receiving the services they have come to enjoy, while fostering continued innovation in a competitive environment. TNC's would be responsible for establishing their service model, and managing their service delivery, including the drivers who provide services and the vehicles they use - all in accordance with regulations set down by the City.

...

While some differences in regulations are appropriate given the different scope of services (taxis use stands and street hails, TNCs only take calls through the app), this document outlines a number of considerations for the City concerning potential new requirements for TNCs and potential reduced requirements for taxis that will "level the playing field". The major suggested considerations for the City are outlined below. TNC Requirements for Consideration:

- Requirement for \$2 million in commercial liability insurance. This policy should meet Financial Services Commission of Ontario (FSCO) standards as being appropriate for vehicle-for-hire services
- Drivers produce a Vulnerable Sector Check, conducted in a manner consistent with the Police Record Checks Reform Act, 2015, the same driver screening process as is required in the taxi industry
- Licensing fees will be comparable to the total licensing fees charged in the taxi industry, for the taxi broker, for the plate holder and for the driver license fees. Both TNC and taxi licensing fees will have an option to reduce fees for part-time participation in the industry, generally by charging a fee per ride to an annual maximum
- A requirement to provide 15% of the service hours using accessible vehicles, or, to provide \$0.30 per TNC ride to support accessible taxi service
- TNC vehicles will have the same inspection requirements as taxis, a provincially certified Safety Standards Certificates annually, and twice a year for vehicles more than five model years old and used more than 30,000 km per year.

Reduced Taxi Requirements for Consideration:

- Eliminate the 5 week training course now required by taxi drivers in favour of taxi broker-provided training (specific training for accessible taxi operation would remain)
- Taxis to have. the same flexibility as TNCs to reduce prices to be competitive, or to increase prices when required to increase supply (except at taxi stands or for street hails, where the regulated taxi fare level established by the City would remain the maximum rate)
- Taxi brokers-would gain the same authority as TNCs to set vehicle requirements (size,age), subject to the same limitation of a maximum of ten years old

- Further improve dispatching by tying the meters to the dispatch systems so the first available vehicle (close. and not occupied) can be dispatched to reduce response times
- Expand the taxi service. boundary to the entire City, with the taxi: population ratio adjusted so no further plates are issued at this time.²⁵⁶

199. KPMG emphasized two primary rationales for proposing a new licensing category for ridesharing services:

- (a) To “respond to the need for improved customer service,” as “a significant sector of VFH customers prefer the TNC business model and the differences in service that it provides”; and
- (b) The Uber model existing at the time, in which it was operating outside the regulatory regime, did not “provide adequately for public safety or accessibility.”²⁵⁷

200. In order to give effect to the broad framework it proposed, KPMG made a series of more detailed policy recommendations. KPMG emphasized that regulation must be “tailored to the circumstances” of each of taxis and ridesharing services.²⁵⁸ Examples of these more detailed recommendations include the following:

- (a) KPMG recommended that any driver of a taxi, TNC or limousine should require a Vulnerable Sector Check conducted in a manner consistent with the *Police Record Checks Reform Act, 2015*, since all drivers are interacting with the public.²⁵⁹
- (b) KPMG recommended that only taxis be permitted to have visual vehicle identification, such as roof signs, and that only taxis be permitted to use taxi stands and accept street hails.²⁶⁰

²⁵⁶ Exhibit 58, *Ibid*, at p. F2727-8.

²⁵⁷ Exhibit 58, *Ibid*, at p. F2732-33.

²⁵⁸ Exhibit 58, *Ibid*, at p. F2734.

²⁵⁹ Exhibit 58, *Ibid*, at p. F2735-36.

²⁶⁰ Exhibit 58, *Ibid*, at p. F2738.

- (c) KPMG recommended that only taxis be required to have cameras, as only taxis operate in circumstances where the driver and passenger are unknown to each other. TNCs did not require cameras, since they only accept pre-arranged rides in which the driver and passenger are known to one another, and which are tracked by GPS. Customers who used Uber generally reported feeling safer, in comparison to taxis, as a result of these features.²⁶¹

- (d) KPMG recommended that taxis maintain a fixed maximum price, since a customer must generally take the first taxi that is dispatched to them, that they flag down, or that is first in line at a taxi stand. However, it recommended that taxis be allowed to work with the City's Chief License Inspector to potentially implement lower pricing for rides not initiated by a street hail or at a taxi stand. KPMG recommended that TNCs be permitted to maintain their variable pricing, contingent on customer consent in advance, as they cannot pick up street hails or use taxi stands.²⁶²

201. The Final Report does not address the potential impact of the proposed regulatory reforms on the street value of plate licenses, or on the economics of the taxi industry. However, the plaintiffs' claim that this exclusion reflects a deliberate desire to "resile from the City's responsibility for them" is simply not reflected in the evidence.²⁶³

202. First, these issues were outside the scope of the Final Report as established by the RFP. The RFP specifies that "research to evaluate the advantages and disadvantages of open-entry and close taxicab markets" must occur as part of the research, analysis, and benchmarking phase.²⁶⁴ The RFP mandates clear and distinct requirements for the final report, which do not include a discussion of the potential economic impacts of any recommendations made by the consultant:

²⁶¹ Exhibit 58, *Ibid*, at p. F2738-39.

²⁶² Exhibit 58, *Ibid*, at p. F2745-46.

²⁶³ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 159.

²⁶⁴ Exhibit 110, *supra* note 101, at p. 1072.

Final Report on Findings and Recommendations

In keeping with the guiding principles for this review (public safety, accessibility, and consumer protection), the successful Proponent will prepare a report on findings with final recommendations for improving Ottawa's taxicab and limousine industry and the current regulatory framework, as the case may be. The report must include, but is not limited to including the following:

- Details on the methodology and approach used to complete project activities and deliverables;
- Findings from project activities and deliverables; and,
- Final recommendations for addressing public and stakeholder concerns and improving Ottawa's taxicab and limousine industry.²⁶⁵ [*emphasis added*]

203. Second, the plaintiffs' claim that issues of plate values were deliberately "obscured" rests on the premise that the Final Report was to be read in isolation. It was not. As set out in the RFP, the Final Report was intended to function as the culmination of a public process of research in review, and was to fulfil the specific function of recommending regulatory changes.

204. As set out above, several discussion papers, along with the Policy Options paper, detailed at length the history and economics of the Ottawa taxi industry, and the potential impacts that licensing Uber would have on the taxi industry, including on plate value. Regurgitating this analysis in the Final Report would have been duplicative, and outside the function of the Final Report. Conversely, the exclusion of this analysis from the Final Report did not mean it suddenly ceased to exist in the public record, or the record that was ultimately put before Council. While the plaintiffs assert that Mr. Bourns "made a conscious decision not to discuss issues of plate value in his final report," his evidence was that the issue of plate values was not included because it was addressed in the discussion papers:

Q. Okay. So, in effect what you did by not mentioning the history that we've reviewed with you, in which time and time again, the City confirmed the closed market system, you decided that, that was outside the scope of the review and so you simply wrote the regulators responsibility for this right out of the script, didn't you?

A. Wrote the regulators responsibility? We did not include a discussion, an extensive discussion of the history of plates and plate values in the final report. We did reflect on some of the potential impacts but....

²⁶⁵ Exhibit 110, *supra* note 101, at p. 1073.

Q. Or the history of the city creating the conditions that allowed development of a secondary market in plates?

A. No, that was intended to come earlier in the, the discussion documents.²⁶⁶ [*emphasis added*]

205. Third, as set out above, through its review, KPMG undertook extensive consultation with, and received extensive submissions from, an incredibly diverse range of stakeholders: members of all aspects of the taxi industry – including brokers, plate holders, non-plate holding drivers; and representatives of Unifor; representatives of Uber; individuals with accessibility needs and representatives of the accessibility community; customers of both taxis and Uber; and a broad swath of the general public. These parties expressed diverse and contradictory views, and it was simply not possible for KPMG to respond to all concerns raised by all parties in its Final Report. As Mr. Bourns explained in his cross-examination:

Q. Okay. And so then you did not explain your rationale for failing to respond to the submission made by the taxi industry, that it — that the plate owners were composed of mainly new Canadians and immigrants?

A. We had submissions from a variety of stakeholders and key stakeholders that all contradicted each other. So we couldn't do everything that was recommended by everybody. And in fact, we couldn't do any everything that was recommended by anybody that was part of that process.²⁶⁷

206. Mr. Bourns' evidence accords with that of Ms. Donnelly, who emphasized that the stakeholders who would be impacted by the proposed regulatory reforms were diverse and not monolithic. This is why the City directed that consultation must be as extensive and as wide-ranging as possible. She stated:

A. Mr. Barqawi, everyone who's been impacted on this regulatory regime will have — they'll be racialized, they'll be seniors, they'll be disabled people, they will be part of, part of the queer community. They will be any number of these things. We are regulating for public safety, consumer protection, and public service and the impacted stakeholders are also not a monolith. What you do is maximize the opportunity for people to directly tell their stories and what is important to them.²⁶⁸ [*emphasis added*]

²⁶⁶ Brian Bourns, Cross-Examination, February 2, 2023, p. 62, lines 2- 16.

²⁶⁷ Brian Bourns, Cross-Examination, February 1, 2023, pp. 122, lines 3-8.

²⁶⁸ Leslie Donnelly, Cross-Examination, January 30, 2023, p. 89, lines 3-11.

207. Fourth, notwithstanding this multiplicity of interests, members of the taxi industry had significant input into and influence over the Final Report. In cross-examination, Mr. Way agreed that “some of your [Coventry Connections] recommendations were put – or were – found themselves in the KPMG final report.”²⁶⁹ Specifically, Mr. Way identified approximately 14 out of 33 policy recommendations that were carried forward in the Final Report.²⁷⁰

208. The Final Report was not intended to be all things to all parties, including to the plaintiff class. It was intended to fulfil the City’s specific requirement for recommendations for regulatory reforms, and achieved that purpose. The limited purpose and scope of the Final Report does not make “invisible” the research and analysis regarding plate value undertaken in the process leading up to the Final Report. Notwithstanding the limited purpose and scope of the Final Report, it carried forward a significant number of recommendations made by Coventry Connections, the dominant player in the City’s taxi industry.

F) The 2016 Staff Report

209. After receiving the Final Report, City staff began reviewing the report, conducting their own research, and preparing their own report for consideration by CPSC, and ultimately Council. This is standard practice after a consultant’s report is received and the matter is to be subsequently considered by Council. Ms. Donnelly was chosen to be the lead author. The report was publicly posted on the City’s website on March 31, 2016, in accordance with standard timelines for release of such materials, one week before it was to be considered by the CPSC.²⁷¹

210. Ms. Donnelly is eminently qualified for work of this type. Ms. Donnelly began working for the RMOC in 1994, and has been with the City since amalgamation.²⁷² Currently, she is the City’s Corporate Public Policy Advisor. At the time of the VFH Review, she was the Deputy Clerk, a role to which she

²⁶⁹ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 63, line 31 – p. 64, line 3.

²⁷⁰ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 59, line 16 – p. 68, line 4.

²⁷¹ Leslie Donnelly, Examination in Chief, January 27, 2023, p. 11, lines 25-32.

²⁷² Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 48, line 23 – p. 50, line 8.

was appointed in 2006. As Deputy Clerk her role included managing policy and authoring the governance and accountability reports for the City Clerk, along with attending and running meetings of City Council. She would also attend meetings of standing committees where “procedural complexity” was anticipated, which could arise from the issues raised, or from large numbers of motions.²⁷³ Prior to authoring the 2016 Staff Report, Ms. Donnelly had authored a major report related to Lansdowne Park, and following the report, she authored a major report on the impact of Covid-19 on Lansdowne.²⁷⁴

211. Further, the plaintiffs’ assertion that Ms. Donnelly’s involvement stemmed from an awareness by the City that the result of the VFH Review would need to be “sold” to the public does not reflect the evidence. To the contrary, and as outlined above, Core Strategies, the Mowat Centre, and KPMG all found that there was substantial public demand for Uber. Indeed, as Core Strategies put it “the research found resoundingly higher customer service and customer experience ratings for Uber over Taxi.”²⁷⁵ The public had seemingly made up its mind on Uber, before the VFH Review began.

212. While the Final Report was the “core document” around which staff based their recommendations, it was not the only input for staff in crafting the 2016 Staff Report. As Ms. Donnelly explained, staff undertook their own study, considering the regulatory approaches of other Canadian municipalities towards Uber, as well as recent guidance from the Competition Bureau:

Q. ...I just want to talk about — a little bit about process and what happens with the KPMG report after it's in the hands of staff. What does staff do with the KPMG report and what were the next steps, or what happened next?

A. Well, so they, they essentially went through the recommendations as indicated and they went through them, and the staff report goes into this, and it not only — KPMG final report, but the six case studies that fed into it, staff looked at those separately, staff looked at the emerging regulatory regimes in Toronto, in particular, Waterloo, Edmonton and Calgary, which were proceeding after KPMG had done their case studies report and any white paper that the competition bureau had put out to, to address this emerging issue as, as part of their mandate.²⁷⁶

²⁷³ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 50, line 22 – p. 52, line 4.

²⁷⁴ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 48, line 29 – p. 49, line 6.

²⁷⁵ Exhibit 114, *supra* note 200, at pp. F3122.

²⁷⁶ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 106, line 24 – p. 107, line 5.

I) The Competition Bureau white paper

213. The Competition Bureau's "white paper" referenced by Ms. Donnelly refers to a paper that the Bureau published on November 26, 2015, entitled "Modernizing Regulation in the Canadian Taxi Industry." The Competition Bureau is an independent regulatory enforcement agency that promotes competition for the benefit of Canadian consumers. Its paper, which is cited throughout the 2016 Staff Report, cites several of the KPMG papers prepared for the VFH Review.²⁷⁷

214. The Competition Bureau's paper, which was quoted in the 2016 Staff Report, recognized a number of the challenges faced by municipal regulators, as well as the taxi industry, as a result of the emergence of ridesharing apps, which it also termed TNCs. These challenges included the threats to public safety that came from the continued operation of TNCs outside of the regulatory regime, as well as the potential negative impact of TNCs on plate values and the traditional taxi business:

While TNCs provide a number of competitive benefits to consumers, they also raise legitimate regulatory issues. Taxi regulations play an important role in addressing market failures and ensuring the safe, orderly operation of ground transportation services and keeping drivers, passengers and the general public safe. As TNCs operate outside of traditional regulatory frameworks, they raise a number of issues relating to ensuring public safety, consumer protection, and other public interests.

Many regulators have expressed concern that TNC drivers do not undergo sufficiently robust criminal background checks and/or that they do not carry adequate insurance coverage. Traditional taxi companies and drivers argue that not only does this create safety and liability concerns, the unlevel playing field may jeopardize investments made by companies and drivers to establish themselves in the taxi business. As discussed above, competition from TNCs may also cause a significant decrease in the value of taxi plates, which may represent significant investment losses to these stakeholders. These concerns have led many regulators to restrict or discourage the entry of TNCs into local areas.²⁷⁸ [*emphasis added*]

215. The above passage is particularly relevant in light of the plaintiffs' claim that the 2016 Staff Report "ignores plate values."²⁷⁹

²⁷⁷ Exhibit 59, *supra* note 103, at p. F2776.

²⁷⁸ Exhibit 59, *supra* note 103, at pp. F2802-3.

²⁷⁹ Plaintiffs' Closing Submissions, dated April 6, 2023 *supra* note 11, at p. 58, heading 6.

216. Notwithstanding these challenges, the Bureau recommended against preventing or discouraging the entry of ridesharing apps into local markets, as “[g]reater competition benefits consumers in terms of lower prices, higher quality of service, increased consumer convenience, and higher levels of innovation.”²⁸⁰ To that end, the Bureau emphasized that the regulatory regime for both ridesharing apps and taxis should be “light,” and should only impose regulations to the degree that they are necessary to achieve legitimate public policy goals, such as public safety, consumer protection, and accessibility. The 2016 Staff Report quotes the Bureau as follows:

Regulations should not be designed or implemented in a manner that favours or protects certain industry participants over others in the absence of legitimate policy goals. Just as regulators should ensure that the regulatory burdens placed on TNCs are not excessively onerous and are strictly tied to achieving policy objectives, they should also consider whether regulatory frameworks governing traditional service providers are unduly burdensome or restrictive. When regulators contemplate how to resolve differences in the regulatory regimes that apply to different business models, they should first look at how the existing regulation can be overhauled, rather than solely imposing restrictions on new entrants.

Regulations should be made and tested using empirical evidence wherever possible. Industry participants have an incentive to convince regulators to impose rules that favour and protect their own interests, rather than the public interest. To keep this process honest, regulators should demand and rely on empirical evidence to test the efficacy of any new regulation wherever possible. This evidence-based approach to regulation provides a more objective basis on which regulations should be imposed. Regulators should be able to demonstrate that a rule will have an intended result prior to implementation, and progress should be measured on an ongoing basis to assess whether the rule is having its intended consequence.

Particularly when considering industries that are subject to disruptive innovations and rapid change, regulators should continually question the effectiveness of current restrictions. Existing regulations may no longer be serving their intended purpose and may even stand in the way of desired changes, or may be overly burdensome compared to less intrusive alternatives.²⁸¹ [*emphasis added*]

II) The experiences of other municipalities

217. A further input considered by staff beyond the material prepared by KPMG and its subcontractors was their own study of the regulatory steps taken by other Canadian municipalities. Staff reviewed the experiences of Toronto, Waterloo, Calgary and Edmonton, as the Case Studies paper’s

²⁸⁰ Exhibit 59, *supra* note 103, at p. F2803.

²⁸¹ Exhibit 59, *supra* note 103, at pp. F2803-4.

analysis of those municipalities was not fully up to date by the time the 2016 Staff Report was being drafted.

The report notes that in Ontario, Toronto was in the midst of its own regulatory review, while Waterloo had brought forward a draft by-law that would establish a new licensing category for ridesharing services, distinct from the licensing category for taxis.²⁸² Outside of Ontario, both Edmonton and Calgary had amended their regulatory regimes to establish licensing categories for ridesharing services distinct from the licensing category for taxis.²⁸³

III) The 2016 Staff Report considered the issue of plate values

218. The plaintiffs' claim that the 2016 Staff Report "ignores" plate values is simply not tenable, given that the report includes a section specifically devoted to summarizing the past debates on compensation for plate license holders and analyzing the issue. The report identifies the origins of the debate in Ottawa as follows:

The issue of compensation for plate holders appears to have first arisen in the context of the Ottawa-Carleton Licensing Committee's Taxi Report, presented to Regional Council on September 27, 1989. That Report was the culmination of the work initiated following a February 1987 resolution by Regional Council directing that a study be undertaken to review municipal licensing generally, and taxi and limousine licensing in particular. While industry representatives proposed compensation in the event that the outcome of the review affected the "street" value of taxi licences, the Report itself noted that there was no legal entitlement to compensation. More specifically, the Report set out the following reasons why no compensation should be paid in the event that reforms affected the street value of licences:

- License is property of municipality
- Purchase of license is speculative investment
- Municipality under no obligation to maintain street value or compensate for cost value
- No compensation paid elsewhere (examples: deregulation in U.S. and U.K.; regionalization in Montreal).²⁸⁴

²⁸² Exhibit 59, *supra* note 103, at pp. F2799-F2800

²⁸³ Exhibit 59, *supra* note 103, at pp. F2796-97.

²⁸⁴ Exhibit 59, *supra* note 103, at pp. F2859-60.

219. The 2016 Staff Report explains that the recommendations in the 1989 report were not adopted, and that the issue remained dormant until it was revived by the Ottawa Transition Board as part of its work in preparation for the municipal amalgamation that took place on January 1, 2001. The 2000 report of the Ottawa Transition Board's Taxi Project Team identified the street value of plate licenses as an impediment to reform of the industry, and, presaging the later findings of KPMG and Core Strategies, added that plate holders had become "more concerned with protecting the market value of the license than in providing service to the public leading to lower standards and more consumer complaints."²⁸⁵

220. The 2016 Staff Report notes that the Taxi Project Team's report did not recommend paying compensation to plate holders for regulatory changes, on the basis that: (1) plates belong to the issuing municipality; and (2) that the street value of plates is purely a function of speculation. The 2016 Staff Report also identified a 2001 staff report regarding reforms to the taxi industry after amalgamation that once again found that there is no municipal duty to compensate plate license holders for regulatory changes.²⁸⁶ The 1989 Report of the RMO Licensing Committee, the 2000 Report of the Taxi Project Team, and the 2001 Report are discussed in greater detail below in the context of Common Issue 1.

221. Summing up the issue, the 2016 Staff Report concludes:

The prevailing view, as reflected in the various earlier reports, is that a municipality is not under a general legal obligation to provide financial compensation for any loss in the notional or street value of a taxi license if that value is diminished as a consequence of the municipality's exercise of its regulatory authority. The basis for this view is unchanged from that which was described in the 1989 and 2001 reports proposing reforms to the taxi industry in the City of Ottawa.²⁸⁷

222. The inclusion of this discussion in the 2016 Staff Report demonstrates two things: First, that the report itself did not ignore the issue of plate value, notwithstanding the plaintiffs' claims to the contrary.

223. Second, it is evidence that this issue was squarely in the minds of Council when it adopted the amendments that would give rise to the 2016 By-law. As Ms. Donnelly explained, the issue of

²⁸⁵ Exhibit 59, *supra* note 103, at p. F2860.

²⁸⁶ Exhibit 59, *supra* note 103, at p. F2861.

²⁸⁷ Exhibit 59, *supra* note 103, at p. F2862.

compensation was included in the 2016 Staff Report because “the discussion was going to happen.”²⁸⁸ Plate license holders had raised the issue with KPMG during the VFH Review, just as they had raised it with the City during the previous taxi review, in 2005.²⁸⁹

IV) Recommendations in the 2016 Staff Report

224. Ultimately, the 2016 Staff Report adopted most of the recommendations put forward by KPMG in its Final Report. Each recommendation was analyzed, and staff provided a summary rationale for the acceptance, rejection, or amendment of the recommendation.²⁹⁰

225. The overarching recommendations of the 2016 Staff Report were: (1) that a new licensing category for ridesharing services, to be termed “PTCs” be adopted; and (2) that the regime for taxis be maintained, with some regulatory requirements reduced or eliminated. The purpose of reducing the regulatory burden on taxis was to meet “the Competition Bureau’s recommendation to retain only those regulations that are necessary to meet Council’s public policy goals,[and] to help ensure the industry is freed up to make the kind of business decisions it believes it needs to make to compete.”²⁹¹ The recommended changes to regulation of taxis included:

- Reduce the standard taxi driver license fee from \$170 to \$96;
- Waive the accessible taxi driver license fee;
- Eliminate the requirement for the Taxi Driver Education Program and the refresher training course (retaining the Accessible Taxicab Training Course);
- Eliminate the uniform and street guide requirements;
- Eliminate the \$1.50 credit card processing fee;
- Eliminate taxicab vehicle standards with respect to interior and trunk size, seating capacity and window tinting;
- Increase the allowable vehicle age from 8 to 10 years, with authority delegated to the Chief License Inspector to disqualify a vehicle in the interest of public safety;

²⁸⁸ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 130, lines 28-30.

²⁸⁹ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 126, line 27- p. 127, line 5.

²⁹⁰ Exhibit 60, Document 5 to the March 31, 2016 Staff Report, p. F2958.

²⁹¹ Exhibit 59, *supra* note 103, at p. F2779.

- Change the requirement for in-vehicle cameras so that only minimum standards are specified, rather than specific makes and models;
- Expand the regulated area to include the entire City of Ottawa; Increase the ratio of plates-to-population from 1:784 to 1:806; and,
- Consistent with all three vehicle-for-hire classes, increase the liability insurance requirement from \$2 million to \$5 million Commercial General Liability and Motor Vehicle Liability for Taxi plate holders (covering all drivers who drive a taxicab), and introduce similar insurance requirements for Taxi Brokers.²⁹²

226. The 2016 Staff Report includes the following table summarizing the common features and distinguishing features associated with the proposed changes to the regulatory regime for taxis, limousines and PTCs:²⁹³

	Taxis	Limousines	PTCs
Common Features			
Driver Screening	Police Vulnerable Sector Check, Statement of Driving Record	Police Vulnerable Sector Check, Statement of Driving Record	Police Vulnerable Sector Check, Statement of Driving Record
Vehicle Safety Age	10 years (this is an increase from the existing 8 years)	10 years (except vintage)	10 years
Vehicle Safety Inspection	Annual Safety Certificate (MTO); biannual for vehicles 5 years of age and older	Annual Safety Certificate (MTO); biannual for vehicles 5 years of age and older	Annual Safety Certificate (MTO); biannual for vehicles 5 years of age and older
Insurance	Increase liability insurance from \$2M to \$5M	Increase liability insurance from \$1M to \$5M	\$5M liability insurance
Distinguishing Features			
Model	Adjunct to Public Transportation Network	Special / Auxiliary Service Category	Private Service Provider
Regulatory Approach	Administered by the City. Significant City involvement.	Administered by the City. Modest involvement relatively small specialized nature of the sector.	Self regulation with mandatory reporting requirements. Spot audits. Buyer beware. Modest City involvement

²⁹² Exhibit 59, *supra* note 103, at pp. F2778-9.

²⁹³ Exhibit 59, *supra* note 103, at pp. F2752-4.

			except for monitoring and enforcement efforts.
Arranging Pick-up	Hail, taxi-stand, pre-arrangement by phone, or app	Pre-arrangement by phone, website or app	Pre-arrangement by app only
Fares	Maximum fare with ability to lower fare only for rides pre-arranged through an app	Minimum fare based on 90-minute increments	Variable (no restrictions, set by the market with consumer consent)
Accessibility	Licensed, regulated, accessible on demand	N/A	Levy to support accessible transportation services
Cameras	Mandatory for passenger and driver, given anonymity of street hail	Not mandatory given that all rides are prearranged.	Not mandatory given that all rides are prearranged.
Meter Inspections	Mandatory to ensure accuracy of fare for fares that are not prearranged by app	N/A rides are prearranged	N/A rides are prearranged
Vehicle Identification	Numbered plate on bumper, number on side of vehicle, roof	No vehicle ID	No vehicle ID
Complaint process	Administered by the City	Administered by the City	Administered by PTC
License fees	Reduced to reflect anticipated reduction in enforcement and inspection costs	No change	Established at a level to recoup anticipated costs of monitoring and enforcement.

227. The 2016 Staff Report appended numerous documents, including: a document setting out staff's rationale for accepting, rejecting or amending each of KPMG's recommendations; drafting instructions for by-law amendments to give effect to the regulatory changes; the Competition Bureau's white paper, "Modernizing Regulation in the Canadian Taxi Industry"; and every discussion paper and report produced by KPMG and its subcontractors during their review. The following is a complete list of

documents that were appended to the 2016 Staff Report as “supporting documentation. All of this material was before Council, and all of it was publicly available. ²⁹⁴

Number	Document title	Exhibit	Caselines Ref.
Document 1	Final KPMG Report, December 1, 2015	Ex. 59	F2772
Document 2	Draft Private Transportation Company by-law	Ex. 117	F2924
Document 3	Drafting instructions – Amendments to Taxi By-law (2012-258, as amended)	Ex. 118	F2941
Document 4	Drafting Instructions —Amendments to Schedule 10 to the Licensing By-law(2002-189, as amended) relating to Limousine Service	Ex. 119	F2951
Document 5	Summary of KPMG Recommendations including Staff disposition	Ex. 60	F2958
Document 6	Licensing Fee Summary – Taxi, Limousine and Private Transportation Company Licensing Fees	Ex. 120	F2974
Document 7	Ottawa Passenger Fares (2005-2016)	Ex. 121	F2976
Document 8	Ottawa Taxi Plate Summary	Ex. 42	F2978
Document 9	Case Studies discussion paper	Ex. 112	F2980
Document 10	Current Regulatory Regime discussion paper	Ex. 113	F3024
Document 11	Emerging Issues in the Taxi and Limousine Industry discussion paper	Ex. 44	F3048
Document 12	Accessibility discussion paper	Ex. 115	F3074
Document 13	Taxi Economics – Old and New discussion paper	Ex. 55	F3088
Document 14	Customer Experience discussion paper	Ex. 114	F3120
Document 15	Policy Options paper	Ex. 56	F3140
Document 16	Competition Bureau’s White Paper: Modernizing Regulation in the Canadian Taxi Industry	Excerpted in Ex. 59	F2802

²⁹⁴ Exhibit 59, *supra* note 103, at p. F2878.

228. As Ms. Donnelly explained, the purpose of appending all supporting documents to the 2016 Staff Report was to ensure that the public and Council had access to all the inputs that factored into Staff's recommendations, and to allow for maximum transparency:

MR. BURKE: Q. And we see in a number of these documents that we've been looking at that have been associated with the staff report, in the top right corner says document 16...

A. Yes.

Q. What's the significance of this document and a number?

A. All of these documents were appended to the staff report. In the staff reports that I have authored over the decades, I will always put in the inputs into those documents that are referenced and given a rationale so that both members of council and the public can judge for themselves as it were to participate in the conversation and the only time I don't do that is for like media articles, I won't, I want append those to a staff report. But it's to allow maximum transparency on, on — for decision making, it's not — you know, staff can say here, we think this is what's important in, in this document but you go ahead and read it for yourself, judge. So there were a lot of inputs into the thinking in this document so there are a lot of appendices.²⁹⁵ [*emphasis added*]

229. The issue of the potential impact of the proposed amendments on plate value was not hidden or ignored in the 2016 Staff Report. It was explicitly addressed in the report itself, and was expanded on in greater detail in the reports and papers that were appended to the 2016 Staff Report.

G) The Community and Protective Services Committee (“CPSC”) meeting.

230. The CPSC held a Special Meeting with two days of public submissions on April 7 and 8, 2016, to consider the 2016 Staff Report (the “Special Meeting”). Special meetings are distinct from regular meetings only in that they are generally devoted to consideration of a single issue, rather than the general business of the committee.²⁹⁶ In this case, the 2016 Staff Report was the sole item under consideration. Although Special Meetings have truncated notice requirements for the agenda items under the City's Procedural By-law, in this case, CPSC provided the standard period of notice, by posting its agenda, the 2016 Staff Report, and all supporting documents on the City's website one week in advance of the meeting.²⁹⁷

²⁹⁵ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p.115, line 22 – p. 116, line 9.

²⁹⁶ Leslie Donnelly, Examination in Chief, January 27, 2023, *supra* note 271, at p.13, line 29 – p. 14, line 29.

²⁹⁷ Leslie Donnelly, Examination in Chief, January 27, 2023, *supra* note 271, at p.14, lines 17-22.

231. In the week before the Special Meeting, City staff held one-on-one meetings with key stakeholders, including Unifor, taxi drivers and plate license holders, taxi brokers, and representatives of the accessibility community.²⁹⁸ The purpose of these meetings was to discuss the proposed amendments put forward in the 2016 Staff Report, and to give those stakeholders further opportunity for direct input. Concerns regarding the *Charter* and the Ontario Human Rights Code were not raised in those meetings.²⁹⁹

232. The Special Meeting was held over two days, on April 7 and 8, 2016. Because there was significant public and Council interest in the 2016 Staff Report and its recommendations, the decision was made to move the meeting from its usual venue to the much larger Council Chambers. At least 15 Councillors attended most of the Special Meeting, while another four or five Councillors participated in at least a portion of the two day meeting.³⁰⁰

233. The Special Meeting was held and conducted in accordance with the City's Procedural By-law, which governs, amongst other things, meetings of Committees. The Procedural By-law provides that public delegations are not heard directly before City Council, but before a Committee of Council; in this case, the CPSC. The rules applicable to such meeting are that the Committee may receive delegations from the public, subject to a time limit of five minutes per presentation. The Committee may extend the time for the presentation, which is followed by questions from the Committee to the presenter.³⁰¹

234. The Special Meeting began with the presentation of the 2016 Staff Report and its recommendations by staff to the CPSC. Senior City officials including the Deputy City Manager, BLRS staff, and the City Clerk and Solicitor were on hand to answer any questions.³⁰² The CPSC then heard

²⁹⁸ Exhibit 62: presentation to CPSC, April 8, 2016, p. B-1-5767; Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 73.

²⁹⁹ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 73.

³⁰⁰ Leslie Donnelly, Examination in Chief, January 27, 2023, *supra* note 271, at p.15, line 24 – p. 16, line 20.

³⁰¹ Exhibit 122: By-law 2014-441, s. 83(5), p. B-1-7904.

³⁰² Leslie Donnelly, Examination in Chief, January 27, 2023, *supra* note 271, at p. 16, line 21 – p. 17, line 30.

48 presentations and received 54 pieces of correspondence. The City specifically invited all stakeholders that it was in contact with to make presentations to the CPSC.³⁰³

235. The Minutes of the Special Meeting record that numerous members of the taxi industry and the plaintiff class, along with various other stakeholders made presentations to the CPSC, including:

- (a) Chris Schafer, Public Policy Manager, Uber Canada;
- (b) Dean McCracken, Uber Driver;
- (c) Richard Szirtes, President of the plaintiff broker Westway;
- (d) Brian Wade, Chair of the Accessibility Advisory Committee;
- (e) Mr. Way;
- (f) Rafael Kamar, Taxi driver;
- (g) Courtney Francis, the President of Ziptrack, the corporate entity that runs the dispatch and call centre for Coventry Connections;³⁰⁴
- (h) Bahador Ayoubzadeh, Taxi Driver;
- (i) Sean McGee, legal counsel for Unifor;
- (j) Amrik Singh, then the President of Unifor;
- (k) Bob Orr, assistant to the President of Unifor;
- (l) Ahmad S. Abouali, Taxi Driver;
- (m) Andre Houlahan, Taxi Driver;

³⁰³ Leslie Donnelly, Examination in Chief, January 27, 2023, *supra* note 271, at p. 19, lines 4-7.

³⁰⁴ Marc André Way, Cross-Examination, January 17, 2023, *supra* note 122, at p. 15, lines 11-21.

(n) Anupam Kakkar, Uber Driver;

(o) Farid Haddad, Taxi Driver;

(p) Liam Crossan, Taxi Driver;

(q) Gill Balwinder, Capital Taxi; and

(r) Tony Hajjar, who has been identified by the plaintiffs as a plate license holder.³⁰⁵

236. In his examination in chief, Mr. Way claimed that he was given “roughly 10 to 12 “minutes” to speak before the CPSC, whereas Chris Schafer, who presented on behalf of Uber, was given “roughly two and a half hours”:

Q. So how much time were, do you recall how much time you were actually given for your presentation?

A. I believe it, well, I believe it was about 10 minutes. It was more than — yes. It was roughly 10, 10 to 12 minutes.

Q. Was there a representative from Uber at this meeting?

A. Yes. There was.

Q. Did they make a presentation?

A. Yes.

Q. Do you recall how much time they were given for their presentation?

A. They, they had a much longer period of time. In fact, they were, they, they, they were on the, I don't want to say — but they were in, in, in where we are asked to do the presentation for roughly two and a half hours.³⁰⁶ [*emphasis added*]

237. However, in cross-examination, Mr. Way admitted that this earlier evidence was inaccurate. He agreed that he and Mr. Schafer both received roughly equal time to speak, and that both then received a substantial number of questions from the CPSC:

Q. All right. And when you gave your evidence to Ms. Sandilands, I understood that you were complaining that you hadn't gotten as much time as Mr. Schafer?

³⁰⁵ Exhibit 61, *supra* note 111, at pp. F527-29; Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, para 176.

³⁰⁶ Marc André Way, Examination in Chief, January 9, 2023, p. 44, line 16 – p. 45, line 31.

A. I, I did receive five minutes, I guess I should have qualified my, my comment by saying that Mr. Schafer was there for close to two hours.

Q. Right.

A. And that could have been because of, because of question and answer period.

Q. Right. And in fact that is the case, Mr. Schafer started speaking at 100-09, the end of his presentation was 10-455. The question period started at 10-456 and went to 346-18. That was the — and that's how it was structured that if the councillors had questions, then they could ask those questions after individuals were given their allocation of time, correct?

A. Correct.

Q. And I suppose some of the questions that were being asked of Mr. Schafer were questions likely that you wanted to have asked.

A. I can't, I can't confirm that.

Q. You can't remember?

A. I can't confirm it.

Q. Well, is, is that because you can't remember?

A. I can't remember.

Q. You can't remember. All right. And, sir, your presentation was at — started at 5:07:40 and went to 5:13:35. That sound — that's the length of time, roughly?

A. Roughly, I had five minutes or so.

Q. Five minutes or so. And in fact you also had a question and answer, correct?

A. Correct.

Q. And your question and answer started at 5:13:36 and went to 5:56:25. Would that be about right?

A. That would be about right.

Q. Yeah, about an hour or so total you were in front of....

A. Yeah, the question period was about 35, 40 minutes, yeah.

Q. Okay, all right. So, so the real — the situation is such that you were both given equal amount of time, he just happened to get more questions than you did?

A. Yes, that's why I corrected, yes.³⁰⁷ [*emphasis added*]

238. The CPSC heard from a multiplicity of competing viewpoints at the Special Meeting. For example, the Minutes state that delegations opposed to the 2016 Staff Report made points including that:

- All rules governing the taxis should be applied to the PTC drivers such as insurance, cameras, courses, etc ...

³⁰⁷ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 118, line1 – p. 119, line 11.

- Taxi plate owners should be compensated for the reduction in their investment.

239. However, even the viewpoints expressed by the taxi industry were not uniform. The submission of Bob Orr, assistant to the President of Unifor, asked for the elimination of exclusive (or “closed”) taxi stands, and advocated for an elimination of multi-plate ownership. The submission states, in part:

all drivers should have;

1. Access to all concession stands

- This proposal was made by three Units of Local 1688 representing more than half of the taxi drivers in Ottawa, to the consultants during the taxi review but was left out of the report.
- There are currently 45 exclusive/closed stands in the city²
- Toronto By-laws prohibit exclusive/closed stands This would provide fairness for all drivers and prevent the travelling public from being dragged into a "turf war" like we saw last fall as a result of tactics used by the Airport Authority and Coventry Connections.
- That a "Turf War" resulted in the Airport Authority and Coventry extracting \$2.25 Million Dollars directly from the taxi drivers.
- This was not in the best interest of the public and pitted driver against driver.

...

- Move to a single plate owner system

...

- Multi-Plate owners have different revenue streams and are not subject to the same hardship as drivers when ridership is down.
- Multi-Plate owners are paid directly by the drivers, a guaranteed amount.
 - For example the owner of 87 Plates receives;
 - 87 X \$750.00 a month leasing fee (\$65,250 per month)
 - The owner of 66 plate receives from the drivers
 - 66 x \$750 a month leasing fee (\$49,500.00 per month)
- In addition to the above Coventry Connections collects stand rent, an average of \$420.00 per month X 1132 cars. (\$475,440.00 per month).³⁰⁸ [*emphasis added*]

240. Outside of the taxi industry, a different competing viewpoint was represented by Dean McCracken, a hearing impaired Uber driver, who explained that the prearrangement required by the

³⁰⁸ Exhibit J: Presentation of Bob Orr, April 7, 2016, p. B-1-5715.

Uber app allowed him to successfully pick up passengers in a manner that would simply not be possible as a taxi driver.³⁰⁹

241. None of the delegations before the Committee raised concerns regarding the *Charter* or the *Ontario Human Rights Code*.³¹⁰

242. After the close of public delegations, the CPSC debated 15 separate motions that would amend the recommendations of the 2016 Staff Report, carrying many of them. Some of the motions carried included:

- (a) A motion to delay the effective date of the proposed amendments by three months to September 30, 2016, on the basis that “the taxicab industry has expressed an interest in a long implementation timeline.”³¹¹
- (b) A motion granting the Chief License Inspector the same summary power to suspend PTC licenses for contravention of the proposed by-law as already existed for taxi licenses;³¹²
- (c) A motion granting the Chief License Inspector the power to suspend PTC licenses if the PTC fails to provide the City with the information prescribed by the by-law;³¹³ and
- (d) A motion based on “input received from taxi industry representatives” amending the proposed by-law to allow taxis to impose a special \$15 surcharge for luxury or larger vehicles booked online, and a \$5 fee for late cancellation of a fare.³¹⁴

243. In the final vote, the Committee voted to recommend adoption of the recommendations set out in the 2016 Staff Report, as amended by the various motions that were carried.³¹⁵

³⁰⁹ Exhibit I: CPSC April 7 Audio (beginning at 43:15), p. B-1-6006

³¹⁰ Leslie Donnelly, Examination in chief, January 27, 2023, *supra* note 271, at p. 21, line 29 – p. 22, line 2.

³¹¹ Exhibit 61, *supra* note 111, at p. F531

³¹² Exhibit 61, *Ibid*, at pp. F532-3.

³¹³ Exhibit 61, *Ibid*, at pp. F535-6.

³¹⁴ Exhibit 61, *Ibid*, at pp. F539-40.

³¹⁵ Exhibit 61, *Ibid*, at pp. F545-54

H) The City Council Meeting, April 13, 2016

244. The recommendations set out in the 2016 Staff Report, as amended by the various motions passed at CPSC, were considered by Council at its April 13, 2016 meeting. Council debated its own series of motions, and passed several, including:

- (a) A motion directing staff to provide updates on the compliance of PTCs with the proposed regulatory regime and on the issue of whether cameras should be required in PTCs, including through a verbal update three months after enactment, and a written update one year later;³¹⁶
- (b) A motion reducing the Automobile Insurance Requirements for all VFH categories from \$5 million to \$2 million; and ³¹⁷
- (c) A motion directing the City to ask the Province of Ontario to amend the *Municipal Act* to provide the City with the authority to establish rates and fares for PTCs, on the basis that it was currently “limited to the owners and drivers of taxicabs.”³¹⁸

245. Council ultimately adopted the recommendations, as amended.³¹⁹ Following Council’s adoption of the recommendations, and in accordance with the City’s Procedural By-law, the draft by-law was placed on the bulk consent agenda for Council’s August 31, 2016 meeting, and was subsequently enacted without further debate.³²⁰ The 2016 By-law came into force on September 30, 2016.

246. It is uncontroverted that, as Justice de Sousa found in *Unifor*, the 2016 By-law was enacted in accordance with the City’s Procedural By-law.³²¹

³¹⁶ Exhibit 123: Council Meeting Minutes 29, April 13, 2016, pp. F3714-5.

³¹⁷ *Ibid.*

³¹⁸ Exhibit 123, *Ibid.*, at pp. F3723.

³¹⁹ Exhibit 123, *Ibid.*, at pp. F3723-33.

³²⁰ Leslie Donnelly, Examination in Chief, January 27, 2023, *supra* note 271, at p. 34, line 25 – p. 35, line 18.

³²¹ Leslie Donnelly, Examination in Chief, January 27, 2023, *supra* note 271, at p. 35, lines 18-21; *Unifor*, *supra* note 116, at [para 88](#).

I) The plaintiffs' claim that their concerns were ignored or written out are not credible

247. As the evidence set out above demonstrates, KPMG and the City made specific and extensive efforts to consult with members and representatives of the plaintiff class during the course of the VFH Review. These consultations with the plaintiff class occurred over and above KPMG's consultations with and receipt of submissions from the general public. A summary of this consultation follows:

- (a) The City specifically advertised the VFH Review to members of the plaintiff class by mailing a pamphlet to every licensed taxi driver, and by placing posters advertising the review at the airport, and in the offices of Coventry Connections.³²²
- (b) KPMG met directly with Coventry Connections on four occasions, and with Unifor on at least three occasions. It met with Westway once;³²³
- (c) Members of the taxi industry participated in the seven workshops held by KPMG;³²⁴
- (d) KPMG received two detailed policy submissions from Coventry Connections during the course of the VFH Review, including before and after the release of the Policy Options paper;³²⁵
- (e) Numerous members of the taxi industry, including drivers, plate holders, Mr. Way, Mr. Szirtes (the President of Westway), and the President and legal counsel for Unifor, made delegations to the CPSC during its meeting of April 7-8, 2016; and³²⁶
- (f) Coventry Connections' lobbyist, Jeff Polowin, met and communicated extensively with every City Councillor, and numerous senior City officials, throughout the course of the

³²² Exhibit 58, *supra* note 109, at p. F2730; Exhibit 54: Pamphlet re: Taxi and Limousine Review, p. B-1-6255.

³²³ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 66, line 25 – p. 68, line 8.

³²⁴ Exhibit 58, *supra* note 109, at p. F2730.

³²⁵ Exhibit 24, *supra* note 228, at p. F132; Exhibit 142, *supra* note 251, at p. B-1-8545.

³²⁶ Exhibit 61, *supra* note 111, at pp. F527-29; Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para 176.

VFH Review.³²⁷ Mr. Way participated in many of these meetings, though he did not register as a lobbyist or keep a log of his lobbying interactions. Indeed, it was Mr. Way's evidence that he was "in continual discussions about Uber with City officials."³²⁸

248. Set against this backdrop of extensive consultation, the plaintiffs' claims that their concerns were ignored, or that they were "written out of the script," are simply not true. The plaintiffs' fundamental quarrel is with the outcome of VFH Review, the 2016 By-law. Yet, they attempt to cloak this quarrel in complaints about process that simply do not bear scrutiny.

249. There is perhaps no better example of this attempted sleight of hand than Mr. Way continually changing his evidence about whether any of Coventry Connections' policy recommendations to KPMG were ultimately incorporated into the 2016 Staff Report.

250. First, in his examination in chief, Mr. Way stated that none of Coventry's recommendations were "take[n] up" "by the KPMG Review":

Q. Did the KPMG review take up any of Coventry's recommendations?

A. No.³²⁹

251. However, when confronted on cross-examination with evidence that at least 21 of Coventry's policy recommendations were incorporated into the Policy Options paper, Mr. Way attempted to resile from his original position, adding a clarification that was not present during his examination in chief

Q. Now, Mr. Way, I understood your evidence given in your direct examination to suggest that there were none of your recommendations that had been incorporated in the policy options paper.

A. I did not say policy options paper, I said the final report.

Q. I see. So none in the final report, that's your, that's your position?

A. Correct.³³⁰ [*emphasis added*]

³²⁷ Exhibit 1, Tab 62, *supra* note 114, at pp. F7527 – F7542; Exhibit 1, Tab 132, *supra* note 114, at pp. F7908-F7944.

³²⁸ Marc André Way, Cross-Examination, January 11, 2023, p. 82, lines 10-31

³²⁹ Marc André Way, Examination in Chief, January 9 2023, *supra* note 306, at p. 23, lines 15-18.

³³⁰ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 56, line 27 – p. 57, line 3

252. Next, when Mr. Way was confronted with evidence that numerous Coventry recommendations were incorporated into KPMG's final report, he added a further clarification that when he said "final report," he meant the report by City staff – notwithstanding that KPMG's final report was referred to as the "Final Report" throughout the trial.

Q. All right. And in the final KPMG report, KPMG recommended equivalent driving and criminal record checks for all taxi and PTC drivers, and that is found at F-2895.

A. Sir, just a clarification. When, when we said — when I was saying that none of our recommendations were — we're talking about the report by city staff.

Q. Well, I, I thought you said the final report KPMG final report.

A. I don't think — the staff report.

Q. The staff report?

A. Yes, sir.³³¹ [*emphasis added*]

253. Finally, when confronted with evidence that a number of Coventry Connections' recommendations were incorporated into the 2016 Staff Report, Mr. Way attempted to again resile from his most recent position, adding another, new qualification:

Q. I see, all right. Well, let's just look because I just want to make sure that we're all clear as to what of your, of your recommendations...

A. I think....

Q. ...followed through because as I understood your evidence, sir....

A. I, I was going to go there, but yeah.

Q. Let me finish, please. If I could finish. It was your evidence that none of the recommendations carried forward into the final report of the City?

A. That is why I just qualified what — that is why what I, what I stated, what I have just stated is that my comment, which I knew you were going to bring back to me....

Q. I, I apologize for being highly predictable.

A. When I indicate none of, I meant none of the new recommendations.

Q. All right.

A. I just would like to make that clear.³³² [*emphasis added*]

³³¹ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 63, line 15-25.

³³² Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 81, lines 7-25.

254. Mr. Way's shifting evidence on the question of whether Coventry Connections policy recommendations were incorporated into the VFH Review (they were) is emblematic of the plaintiffs' entire approach. In the absence of evidence that the plaintiffs and their concerns were ignored, the evidence is overstated and the goalposts are continually shifted in support of a thesis that is fundamentally divorced from the evidence.

J) The 2016 By-law has not “destroyed” the taxi industry

255. The plaintiffs claim that the 2016 By-law has “destroyed” the taxi industry.³³³ The evidence does not support this claim.

256. First, the plaintiffs do not cite any evidence establishing the relatively strength or health of the taxi industry as a whole. Instead, they simply equate plate values with the taxi industry writ large. In so doing, the plaintiffs ignore the 75% of licensed taxi drivers that do not hold plates, and instead must pay the plaintiff class for the privilege of operating a taxi.³³⁴ This myopic focus underscores that the plaintiffs do not represent the taxi industry as a whole. They represent its ownership class, with interests that are divergent from the industry's labour class.

257. Second, the plaintiffs' broad assertions about the alleged decline of plate value are not supported by the evidence. The issue of any alleged decline in the value of plates on the secondary market will be addressed by this Court in the damages phase of trial, and will only be relevant if the City is liable. Thus, the evidence on that front is not addressed comprehensively here. However, the following broad points demonstrate the lack of evidence supporting the plaintiffs' characterization of plate value:

- (a) The only evidence to substantiate the alleged value of plates on the secondary market is the transfer price reported to the City by the parties to the transfer. As outlined below in the context of Common Issue 1, the evidence demonstrates that plate license holders

³³³ Plaintiffs' closing submissions, dated April 6, 2023, *supra* note 11, at para 181.

³³⁴ Exhibit 113, *supra* note 28, at p. F3030; Exhibit 42, *supra* note 28, at p. F2978; Exhibit 55, *supra* note 28, at p. F3097.

routinely reported false transfer values to the City.³³⁵ The City's records of plate transfer cannot be relied on as accurate reflections of the state of the secondary market;

- (b) As outlined below in the context of Common Issues 1 and 3, the evidence demonstrates that plate holders invested in plates as speculative assets, knowing that the City did not guarantee and was not responsible for the value of plates on the secondary market;³³⁶
- (c) Mr. Way increased his holdings of taxi plates between 2018 and 2022, during the period of the supposed decimation of the industry. He did this “partly as an investment vehicle because of our belief in the plates”.³³⁷
- (d) The plaintiffs have not considered or addressed the impact of the Covid-19 pandemic, which negatively impacted transportation industries, including the VFH industry, worldwide.

³³⁵ Ziad Mezher, Examination in Chief, January 18, 2023, *supra* note 26, at p.7, line 7 – p.8, line 4; Yeshitla Dadi, Cross-Examination, January 23, 2023, *supra* note 26, at p. 123, lines 4-24; Exhibit 98, *supra* note 26, at p. F1145; Antoine El-Feghaly, Examination-in-Chief, January 25 2023, *supra* note 26, at p. 86, lines 7-11; Iskhak Mail, Cross-examination, January 19, 2023, *supra* note 26, at p. 68, line 6 – p. 69, line 2; Iskhak Mail, Read in to Cross-Examination, January 19, 2023, *supra* note 26, at p. 77, line 3 – 17

³³⁶ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 123, lines 1- 26.

³³⁷ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 114, line 26 – p. 115, line 20.

COMMON ISSUE 1: Was the City negligent in enforcing the Taxi By-law 2012-258 from September 1, 2014 to September 30, 2016

258. The parties agree that the Supreme Court's decision in *Mustapha* sets out the test for negligence.³³⁸ In order to establish the City's liability with respect to Common Issue 1, the plaintiffs must prove that:

- (a) the City owes the plaintiffs a duty of care;
- (b) the City breached the standard of care; and
- (c) if the plaintiffs suffered damages, those damages were caused in fact by the City's breach.

1) The City's Duty of Care

259. Contrary to the plaintiffs' suggestion, there is no need for the Court to engage in the *Anns/Cooper* analysis to evaluate a claim suggesting a novel duty of care. In this case, the plaintiffs' negligence claim is not novel. It is a claim for pure economic loss against the City as a public authority, and as such, falls into one of the recognized categorical exceptions.³³⁹

260. In any claim for pure economic loss against a public authority, proximity forms the core of the analysis, and must be analyzed in the context of the statutory scheme.³⁴⁰

261. A public authority's duty of care can arise in three situations:

- (a) Where the legislation gives rise to a duty of care explicitly or by implication;

³³⁸ *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3 [Mustapha]; Plaintiffs' Memorandum of Law, dated January 3, 2023, A537 at para. 1.

³³⁹ *Eisenberg v. Toronto*, 2019 ONSC 7312, (Ont Sup Ct) at para. 94 [Eisenberg (Ont. Sup. Ct.)]; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, 1992 CanLII 105 (SCC) [Canadian National Railway Co.].

³⁴⁰ *Cooper v. Hobart*, 2001 SCC 79 at para. 43 [Cooper].; *Edwards v. Law Society of Upper Canada* 2001 SCC 80 at para. 9 [Edwards].; *Rausch v. Pickering (City)* 2013 ONCA 740 [Rausch] at para. 56. ; *Williams v. Toronto (City)* 2016 ONCA 666 at para. 16 [Williams].

- (b) Where the authority has, through its conduct, entered into a special, close and direct relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care; and
- (c) Where sufficient proximity arises from a combination of the statutory scheme and the special relationship between the authority and the plaintiff.³⁴¹

262. Where the defendant is a public authority, the proximity analysis will first focus on the statutory scheme, and secondly, on the interactions between the authority and the plaintiff.³⁴²

263. Other relevant factors in determining if a duty of care exists are: (1) reliance; (2) whether the statute provides adequate alternative remedies for a party injured by their interaction with the public authority; and (3) whether the recognition of a duty of care would conflict with an overarching statutory or public duty.³⁴³

A) Duty of care arising from the statutory scheme

I) Legal Principles

264. Canadian courts have consistently held that public authorities regulating in the public interest do not owe a private law duty of care, either to those that they regulate, or to members of the public. As Justice Perell explained in *Eisenberg v. Toronto*, the leading authorities in this category remain the twin 2001 Supreme Court decisions in *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada*.³⁴⁴

In the immediate case, the negligence action for recovery of pure economic losses falls into the category of cases in which the highest Canadian authorities hold that the public authority is regulating in the public interest and has not undertaken a private duty of care. The leading cases are the 2001 cases of *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada*.

³⁴¹ *Williams*, *supra* note 340, at para. 17, citing *R. v. Imperial Tobacco*, 2011 SCC 42 at paras. 43-46 [*Imperial Tobacco*]; *Eisenberg (Ont. Sup. Ct.)*, *supra* note 339, at para. 98; aff'm 2021 ONSC 2776 [*Eisenberg (Ont. Div. Ct.)*].

³⁴² *Taylor v. Canada (Attorney General)*, 2012 ONCA 479 at para. 75 [*Taylor*]; *Williams*, *supra* note 340 at para. 18; *Eisenberg (Ont. Sup. Ct.)*, *supra* note 339, at para. 98.

³⁴³ *Rausch*, *supra* note 340, at paras. 60-67; *Cooper*, *supra* note 340, at para. 43.

³⁴⁴ *Cooper*, *supra* note 340; *Edwards*, *supra* note 340.

In *Cooper*, the Registrar of Mortgage Brokers had statutory authority to license and regulate the activities of mortgage brokers. The plaintiffs suffered economic losses investing with a non-compliant mortgage broker, and they argued that the Registrar owed them a private law duty to suspend the broker's license. In *Edwards*, the Law Society of Upper Canada had statutory authority to license and regulate the activities of lawyers. The plaintiffs suffered economic losses caused by improper use of a lawyer's trust account, and they argued that the Law Society, having knowledge of the manner in which the lawyer operated his trust account, owed them a private law duty to ensure that the lawyer's trust account was operated according to the regulations. In both cases, the Supreme Court of Canada held that there was no private law duty of care on the statutory authority to control the improper behaviour of those it regulated.³⁴⁵ [*emphasis added*]

265. Given that the plaintiffs are claiming negligence against the City as a public authority, the analysis of whether a duty of care exists must first focus on the statutory scheme. The relevant statutory scheme is the 2012 By-law, as it creates a detailed scheme for the licensing and regulation of taxi drivers, plate license holders, and drivers.³⁴⁶

266. In enacting a by-law, a municipality establishes a general standard to benefit the public as a whole. This is a “common feature” of legislation and by-laws. Standards are established in the general public interest and public authorities have a duty to the public at large to see to their enforcement. However, this duty is not equivalent to a private law duty of care.³⁴⁷

267. A statutory scheme that establishes general standards to benefit the public as a whole will generally only give rise to a private law duty of care where the public authority assumes responsibility for ensuring compliance with a standard that is intended to avoid or to reduce a risk of physical damage or harm. Most commonly, these circumstances arise when a municipal authority negligently conducts a building inspection.³⁴⁸

³⁴⁵ *Eisenberg* (Ont Sup Ct.), *supra* note 339, at paras. 107-108.

³⁴⁶ *Vlanich v. Typhair*, 2016 ONCA 517 at para. 28 [Vlanich].

³⁴⁷ *Vlanich*, *Ibid*, at para. 39; cited in *Eisenberg* (Ont Sup Ct.), *supra* note 339, at para. 111.

³⁴⁸ See, eg. *Kamloops (City) v. Nielsen*, 1984 CanLII 21 (SCC) [Kamloops]; *Ingles v. Tutkaluk Construction Ltd.* 2000 SCC 12 [Ingles] and *Mortimer v. Cameron* (1994), 1994 CanLII 10998 (ON CA) [Mortimer]

268. Absent the risk of physical harm, the statutory scheme will generally not impose liability on public authorities for economic losses arising simply because a legislated standard was not enforced.³⁴⁹

269. Two recent Ontario cases provide illustrations of this analysis in the specific context of a taxicab licensing regime. In *Vlanich v. Typhair*, the Vlanichs were injured in a motor vehicle accident involving a taxi owned by the defendant carrying on business as Aces Taxi. In addition to claiming damages against the defendant taxi company for their personal injuries, the Vlanichs alleged that the Township of North-Grenville had negligently failed to enforce its taxi licensing and regulation by-law which required licensed taxis to carry a minimum of \$1 million in insurance coverage.

270. In 2016, Ontario Court of Appeal affirmed the decision of the trial judge dismissing the action against the municipality. In so doing, the Court held that:

By enacting the by-law, the township established a general standard to benefit the public as a whole. This is a common feature of legislation and by-laws. Standards are established in the general public interest and public authorities have a duty to the public at large to see to their enforcement. But public authorities are not liable for losses simply because a legislated standard was not enforced: see, e.g., *Cooper, Kent (Litigation guardian of) v. Laverdiere*, [2011] O.J. No. 4185, 2011 ONSC 5411, 85 C.C.L.T. (3d) 296 (S.C.J.), at paras. 115 and 135; and *118143 Ontario Inc. v. Mississauga (City)*, [2015] O.J. No. 3371, 2015 ONSC 3691, 39 M.P.L.R. (5th) 231 (S.C.J.), at paras. 226-27. The added element of proximity must be present.³⁵⁰ [*emphasis added*]

271. Indeed, it is notable that the plaintiffs rely on *Neilsen v. Kamloops* to argue that the 2012 By-law gives rise to a private law duty of care.³⁵¹ The *Vlanich* decision specifically distinguishes *Kamloops*.

272. In *Kamloops*, the claim was based on a negligent building inspection. The Court found that the purpose of the relevant by-law was to prevent construction of houses on defective foundations and imposed on the building inspector a duty to enforce its provisions for the purposes of preventing physical damage or harm. In short, the inspector's negligence undermined the very purpose of the by-law. The Court of Appeal in *Vlanich* distinguished *Kamloops* (and other negligent building inspection cases) on

³⁴⁹ *Edwards*, *supra* note 340; *Taylor*, *supra* note 342, at para. 78. *Vlanich*, *supra* note 346, at para. 30. citing: *Cooper*, *supra* note 340, and *118143 Ontario Inc. v. City of Mississauga* 2015 ONSC 3691 at paras. 226-227 [*118143 Ontario Inc.*].

³⁵⁰ *Vlanich*, *supra* note 346, at para. 30.

³⁵¹ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at paras. 208-211.

the basis that the Township's by-law did not set a standard to avoid a risk of physical damage or harm.³⁵²

The Court added, "the suggestion that a licensing authority should be liable for economic losses arising from the tortious conduct of non-compliant third-party licensees strikes me as extraordinary."³⁵³

273. The 2019 Superior Court decision of Justice Perell in *Eisenberg v. Toronto (City)*, which was upheld by the Divisional Court in 2021, is even more directly applicable to this case. In *Eisenberg*, the proposed class of Toronto taxicab plate holders sought certification of a class action against the City of Toronto, based in part on the claim that Toronto was negligent in enforcing Chapters 545 and 546 of the *Toronto Municipal Code*. Chapter 545 is the Toronto counterpart of the 2012 By-law, while Chapter 546 is the counterpart to the 2016 By-law.³⁵⁴

274. Justice Perell refused to certify the class action, on the basis that it was plain and obvious that the negligence claims against Toronto would not succeed. In so doing, he explained that:

In the immediate case, the losses are purely economic, and even though Chapter 546 and more so Chapter 545 of the *Toronto Municipal Code* to some degree protect the financial interests of taxi licensees, the overall scheme is that the duty of care is owed to the public as a whole. Neither the *City of Toronto Act* nor the *Toronto Municipal Code* require the City to protect the interests of taxicab owners. The statutory scheme does not create a positive duty to enforce Chapter 545 or Chapter 546 to achieve health and safety outcomes and there no obligation to protect the economic interests of those granted taxi licences.³⁵⁵ [emphasis added]

275. Like in *Vlanich*, the plaintiffs in *Eisenberg* sought to rely on *Kamloops* and similar cases. Justice Perell relied on *Vlanich* in distinguishing these cases, holding that:

In the immediate case, the Plaintiffs relied on the inspection cases or road repair cases of *Kamloops (City) v. Nielsen*, *Rothfield v. Manolakos*, and *Ingles v. Tutkaluk Construction Ltd.* I would distinguish those cases for the same reasons that Justice Sharpe did in *Vlanich*. In the immediate case, there was no foreseeable physical harm to the Plaintiffs or the Class Members from the City's failure to enforce Chapters 545 or 546 and the City did not assume responsibility for preventing the risk of pure economic losses to the taxicab licensees.³⁵⁶

³⁵² *Vlanich*, supra note 346, at paras. 32-35.

³⁵³ *Vlanich*, supra note 346, at para. 36.

³⁵⁴ *Eisenberg* (Ont Sup Ct.), supra note 339, at para. 8.

³⁵⁵ *Eisenberg* (Ont Sup Ct), *Ibid*, at para. 112.

³⁵⁶ *Eisenberg* (Ont Sup Ct), *Ibid* at para. 113.

276. The Divisional Court upheld Justice Perrell's decision and specifically agreed with his analysis around the statutory scheme.³⁵⁷

277. Taken together, the decisions in *Vlanich* and *Eisenberg* demonstrate that Ontario Courts have recently and consistently held that the enactment of a taxicab licensing regime does not create any statutory obligation on the municipality to enforce that regime in a manner that prevents economic loss to licensees arising from the noncompliant conduct of third parties.³⁵⁸

II) Evidence

(1) Taxi regulation in the City of Ottawa prior to amalgamation

278. The purpose of the regulatory regime prior to amalgamation was to ensure public safety and consumer protection. This was the evidence of staff who participated in the taxicab regulatory regime prior to amalgamation, and consultants who studied it. Regulations were put in place to further those purposes, rather than to promote or protect the financial interests of plate license holders.

279. Although the existence of taxicabs for hire predates the Former City's regulation of the industry, the Former City first began issuing licenses for taxicabs as early as the 1930s.³⁵⁹

280. The Former City's regulation of the taxi industry, at the time, was reflective of a broader trend in cities across North America. The combination of soaring unemployment and crashing prices for automobiles resulting from the Great Depression created an environment where, "fewer people could afford to ride a taxi, the number of taxicabs skyrocketed while occupancy rates and revenues per taxi declined."³⁶⁰ A 1933 Washington Post editorial described the resulting chaos as follows:

Cut throat competition in a business of this kind always produces chaos. Drivers are working as long as sixteen hours a day, in their desperate effort to eke out a living. Cabs are allowed to go un-repaired .. Together with the rise in the accident rate, there has been

³⁵⁷ *Eisenberg* (Ont Div Ct), *supra* note 341, at [para. 48](#).

³⁵⁸ *Vlanich*, *supra* note 346, at [paras. 30-39](#); *Eisenberg* (Ont. Sup. Ct.), *supra* note 339, at [paras. 110-112](#), *aff'm Eisenberg* (Ont Div Ct.), *supra* note 341.

³⁵⁹ Statement of Agreed Facts, *supra* note 1, at para. 13, p. F3.

³⁶⁰ Exhibit 146, Report to Ottawa Transition Board, dated September 8, 2000, F2146.

a sharp and concomitant decline in the financial responsibility of taxicab operators. Too frequently the victims of taxicab accidents must bear the loss because the operator has no resources of his own and no liability insurance. There is no excuse for a city exposing its people to such dangers.³⁶¹

281. In response, municipalities across North America imposed regulations over fares, licenses, insurance and other aspects of taxi service in the interests of ensuring safe and reliable public transportation.³⁶² In particular, these municipalities typically took steps to regulate both the number of taxi licenses and the fares which could be charged to passengers.³⁶³

282. The particulars of taxicab licensing by-laws enacted prior to 1969 by the Former City are unknown. However, in 1969, the Former City enacted a Licensing By-law L1, which regulated a number of licensed businesses within the Former City, including the taxicab business. Schedule By-law L1 contained the following features:

- (a) A prohibition on a person operating a taxicab without a license;
- (b) A prohibition on a person providing taxicab service unless the motor vehicle used had a current taxicab plate;
- (c) A prohibition on a person dispatching a taxicab without a license;
- (d) A limit to the number of licenses to be issued for motor vehicles to be operated as taxicabs;
- (e) Provisions under which the holder of a license to operate a taxicab may, after complying with any applicable requirements, transfer his or her license to another person;
- (f) A provision regulating the fare that a taxicab may charge to customers;

³⁶¹ Quoted in Exhibit 146, Report to Ottawa Transition Board, dated September 8, 2000, F2146; also quoted in Exhibit 55, *supra* note 28, at F3091.

³⁶² *Ibid.*

³⁶³ Exhibit 6, 1991 Hickling Report, F2397.

- (g) A provision stating that all licenses, including taxicab plate licenses, are the property of the City; and
- (h) A provision stating that the taxicab licenses were for a fixed a term and renewable in accordance with conditions set out in the by-laws.³⁶⁴

283. In 1971, the Former City enacted By-law L-6, which maintained the above-noted features, as well as added the following requirements:

- (a) A fee for the transfer of a taxicab license to another person; and
- (b) A requirement that the transferor and/or transferee of a license, among others, provide the Former City with a duly executed copy of the written sale agreement between the proposed transferor and the proposed transferee containing the details of their dealings in respect of such taxicab, equipment, taximeter, good will, if any, and any other thing included in the sale agreement, along with a completed application for the transfer of the plate holder license.³⁶⁵

284. Once introduced, the features of the Former City's taxicab regulatory regime largely remained in place until the amalgamation of various municipalities into the current City of Ottawa on January 1, 2001,³⁶⁶ pursuant to the *City of Ottawa Act, 1999*.³⁶⁷

285. Prior to amalgamation and in addition to the Former City, the Predecessor Cities all regulated the taxi industry through their own taxi by-laws.³⁶⁸ These by-laws were enacted at least as early as 1973, and up to December 31, 2000.

³⁶⁴ Exhibit 2, Tab 309, *supra* note 98, at p. F4060.

³⁶⁵ Exhibit 2, Tab 309, *supra* note 98, at pp. F4692 and F4731.

³⁶⁶ Exhibit 2, Tab 309, *supra* note 98; Exhibit 2, Tabs 330-332, By-law L6-2000.

³⁶⁷ *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sched. E.

³⁶⁸ Statement of Agreed Facts, *supra* note 1, at para. 14, p. F3.

286. By the date of amalgamation, the taxicab by-laws of all the Predecessor Cities included the features outlined above, which were first enacted in the Former City, and were “almost completely standardized”.³⁶⁹

287. The plaintiffs suggest that the purpose of taxi regulation is to “protect the interests of the industry as a way of ensuring adequate service to consumers”,³⁷⁰ and that “the City limited entry into the taxi industry with a view to ensuring its economic viability.”³⁷¹ The plaintiffs’ entire analysis of the statutory scheme is framed through this lens. However, the evidence does not support the plaintiffs’ claims.

288. To the contrary, the evidence demonstrates that the regulations enacted by the Former City were intended to establish general standards of taxicab service for the benefit of the public, and specifically to serve the goals of consumer protection and public safety. This is demonstrated, in part, by the very fact that the existence of the taxi industry predates the Former City’s regulation of it. The Former City, like its counterparts across North America, did not create the taxi industry out of whole cloth, nor did it impose a licensing system for the purpose of establishing a lucrative investment vehicle. Rather, it imposed regulations on an industry that was already operating, in order to ensure that the industry continued to operate in a manner that was safe for consumers. The City did the same thing when Uber began operating.

289. Studies of the taxi industry prior to amalgamation consistently spoke to the fact that the purpose of taxicab regulation is to ensure consumer protection and public safety. By way of example, on December 31, 1990 the Hickling Corporation, a public-sector consulting company, delivered a report to the RMOE entitled “Evaluation of Taxi and Limousine Service Demand and Economic Model for Taxi Rate Structure” (the “**Hickling Report**”). At the time, the RMOE lacked the jurisdiction to regulate the taxi industry. The Hickling Report was commissioned in the context of an ultimately fruitless effort by

³⁶⁹ Exhibit 34, *supra* note 98, at p. F2149.

³⁷⁰ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 198.

³⁷¹ *Ibid*, para. 194.

the RMOc to secure legislation that would: (1) give the RMOc, rather than its constituent municipalities, jurisdiction over the taxi industry; and (2) implement a number of structural changes to the industry.³⁷²

290. The Hickling Report examined the purpose of plate limits and regulated taxi fares – two key elements of the regulatory regime – and concluded that:

The regulation of rates and numbers of taxis is a wide spread practice among municipalities. As is often (but not always) the case with common practices, there are reasons why it is done.

Meter rates are regulated to

- eliminate the need to negotiate fares on each trip;
- to ensure a fair rate; and
- to ensure rates adequate to maintain a commonly chosen quality of service.

Taxi numbers are regulated to

- eliminate excessive numbers of cabs competing for fares in peak hours, with associated waste in gas, driver time, and downtown congestion;
- limit entry by poorly qualified drivers, especially during times of recession; and
- minimize pollution and traffic congestion caused by excess taxis.

In general, taxi regulation is designed to overcome the problem of unequal information between the taxi user and the taxi provider. The taxi user does not know the city and the routes as well as the provider, and is unable to fully assess the quality of the service before using it. Driver knowledge and vehicle condition are difficult to assess even when approaching a taxi-stand.³⁷³ [*emphasis added*]

291. However, the report also recognized that “regulation is never a perfect solution to market imperfections. Once a municipality undertakes taxi regulation, common problems can occur.”³⁷⁴

292. One of the key problems the report identified is the issue of high “street” values for taxi plate licenses, which is a by-product of municipalities issuing a limited number of taxi plate licenses. Since plate license-holders have a monopoly on the provision of taxicab services, the licenses “often accrue

³⁷² Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p.117, line 31 – p. 119, line 10.

³⁷³ Exhibit 6, *supra* note 363, at F2397.

³⁷⁴ *Ibid*, F2398.

significant value” beyond the nominal value for which they were issued.³⁷⁵ Typically, this value manifests in transfers on a secondary market. The Hickling Report found that this issue is both common, and very difficult to deal with once created.³⁷⁶

293. Nonetheless, the Hickling Report considered potential solutions to this problem, including whether the taxicab regulatory regime should be amended to prevent the transferability of taxi plate licenses. In recommending against such a change, the report made two key observations. First, that the transferability of plates (and the associated requirement for reporting transfer value to the municipality) serves the overarching regulatory goal of consumer protection; and second, that a prohibition on transfers would be essentially impossible to enforce as license holders would find a way to realize the intrinsic value conveyed by a license that facilitates participation in a monopoly:

Key to the long run guidance of taxi regulatory policy is knowledge of plate values. Plate values are a clear indicator of above normal profits in the taxi industry. When plate values can be observed, taxi regulatory policy can be guided by the simple objective of reducing them to below tolerable limits. This is a much simpler process than trying to estimate rates of profit from financial statements provided by the industry.

It has been proposed that the transfer of plates be forbidden by the Region. Hickling recommends against this for two reasons:

- It eliminates a valuable source of information on profit levels in the taxi industry. Forbidding transfers does not eliminate plate value, it only hides it. The underlying above normal profits will still be there. Forbidding transfers is hiding the symptoms of a problem, rather than treating the problem itself. [emphasis in original]
- It is easily evaded through use of agents, holding companies, management contracts etc. The extra effort in evading this regulation becomes a burden on the industry, and ultimately on the taxi user.³⁷⁷ [emphasis added]

294. Subsequent studies of the taxi regulatory regime came to the same conclusions as the Hickling Report. In 2000, on the eve of amalgamation and during the next round of proposed reforms to Ottawa’s taxi regulatory regime, the Taxi Project Team Report described its mandate as follows:

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid*, F2398-F2399

³⁷⁷ *Ibid*, F2450-2451

The Taxi Project Team first determined what type of regulation would create a taxi industry that would be a credit to our community. Improved service to the public and safe and reliable vehicles topped the list of requirements.³⁷⁸ [*emphasis added*]

295. In its Report, the Taxi Project Team identified, and sought to remedy, several factors that were hindering the safety and quality of taxicab service in Ottawa. The Report identified two prime culprits. The first was the “great – even militant historical resistance to change to the taxi industry in this area.” The Report linked to the second culprit – the high value of taxi plate licenses on the secondary market, writing that:

The financial burden associated with high plate values leads to industry practices which can have a debilitating impact on this industry. This manifests itself in license leasing or renting. The plate holder becomes more concerned with protecting the market value of the license than in providing service to the public leading to lower standards and more consumer complaints. This is the case whether the plate is held by an individual or by a company.

Contrary to industry practice, taxi licenses (plates) belong to the individual municipality. Although commonly considered to have an investment value, that value is artificial or speculative and has been created because of the finite limit on the number of plates issued. The plates do not have an 'asset' value - any person who "buys" a plate does so with considerable risk just as any business involves a degree of risk.³⁷⁹ [*emphasis added*]

296. In order to improve the taxi industry in the then to-be-created City, particularly in the realm of public safety and consumer protection, the Taxi Project Team proposed a series of reforms. Chief among them were the creation of a single taxi “zone” with licensed taxis permitted to work throughout the new city (as opposed to merely within the boundaries of the municipality that issued the taxi’s plate license) and the elimination of limits on the number of taxi plate licenses, with entry instead controlled through high vehicle and driver standards.³⁸⁰

297. The conclusions of these reports regarding the purpose of plate limits accords with the evidence of Susan Jones, who has been involved with the regulation of the taxi industry since the 1990s, initially

³⁷⁸ Exhibit 34, *supra* note 98, at p. F2143.

³⁷⁹ *Ibid*, F2142-43.

³⁸⁰ *Ibid*, F2133.

in her capacity as the Chief License Inspector for the former City of Nepean. Ms. Jones explained the rationale for the limitation of taxi plate licenses as follows:

Q. And what do you understand the rationale to be in relation to the limitation of plates?

A. 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.

Q. And was there any vehicle safety issues associated with the limitation of the plates?

A. There were. Definitely, vehicle safety issues. I, I don't if you want me to elaborate on...³⁸¹
[emphasis added]

298. Both staff in the Predecessor Cities and external consultants understood that the purpose of the regulatory regime was to ensure public safety and consumer protection. Regulations were put in place to further those purposes, rather than to promote or protect the financial interests of plate license holders. Governments are charged with the protection of the public interest, and are not typically the guardians of the interests of a particular group or industry. This was no different in the Predecessor Cities.

(2) Taxi regulation in the City of Ottawa after amalgamation

299. The Current City came into being on January 1, 2001, pursuant to the *City of Ottawa Act, 1999*. It was formed by the amalgamation of 12 separate municipalities.

300. After amalgamation, the taxicab by-laws that had been adopted by the Predecessor Cities initially remained in effect, though subject to occasional amendment, as the City embarked on the

³⁸¹ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 7.

process of developing a new harmonized taxicab by-law.³⁸² These by-laws remained in place to help ensure public safety and consumer protection, just as they had prior to amalgamation. Studies undertaken in support of the harmonization process concluded, like the studies undertaken prior to amalgamation, that the fundamental regulatory tenets of (1) plate limits; (2) plate transferability; and (3) regulated fares were critical to the regulatory goals of consumer protection and public safety.

301. The City engaged KPMG in 2001 shortly after amalgamation to review the recommendations of the Taxi Project Team Report, “in consultation with the taxi and limousine industries,” resulting in KPMG’s May 24, 2001 “Taxi Licensing Issues” Report.³⁸³ The report made a number of recommendations with respect to regulations that would eventually form the basis of a harmonized taxi by-law. In so doing, KPMG recognized that the fundamental purpose of the taxi regulatory regime is to ensure consumer protection and safety for the general public. KPMG described the purpose of its report as follows:

In considering an appropriate approach to follow, it is essential to consider the overall purpose of regulating the taxi industry. That purpose is to ensure there is adequate and appropriate taxi service available to the public, and in particular, to ensure taxi service is safe, convenient, comfortable, courteous and reasonably and predictably priced.

The over-whelming reaction to any proposals with respect to taxi regulation is generally comments from the industry and on the economic viability of the industry. Ensuring the economic viability of sectors of the industry is not the purpose of taxi regulation. However, it is important to recognize that there is a relationship. If the taxi industry is not economically viable, the result will impact service to the public. A regime that results in very low driver income will result in experienced, competent drivers leaving the industry, and/or poorer quality vehicles in service. It should be noted; however, that if the licensing regime provides “too much” income in the industry, the result will largely be higher license values. [*emphasis added*]³⁸⁴

302. KPMG’s 2001 report once again considered the question of whether the regulatory regime should be amended to prohibit the transfer of plate licenses on the secondary market. In recommending against such an amendment, KPMG echoed the finding of the Hickling Report that the value of plates

³⁸² Statement of Agreed Facts, *supra* note 1, at para. 16, p. F3; Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 9-10.

³⁸³ Exhibit 7, *supra* note 127, at p. F2229.

³⁸⁴ *Ibid*, p. F2253.

licenses on the secondary market is an inevitable result of the limit on plate numbers, and that even if transfers were prohibited, license holders would find a way to realize the value of their licenses:

We conclude that unless the number of plates issued is unlimited, the “no transfer” approach would only introduce a more elaborate set of approaches to realize the value of the plates, and that any set of rules devised to prevent transfers would simply result in a new set of “guises” for plate transfers. As an example, the current collective agreement attempts to prevent plate holders from realizing the full market value of the plates by setting a limit on lease rates. The result has simply been the creation of a secondary market, with lessees re-leasing their plates at higher than collective agreement rates, and plate holders in some cases receiving payments for “other services”. The current rules requiring plate holders to own the taxi the plate is affixed to present another example. In practice the lessees buy the cars but are required to register them in the name of the plate holders.

It must be recognized that as long as the number of licenses issued is limited, the licenses will have value...³⁸⁵ [*emphasis added*]

303. Further echoing the Hickling Report, KPMG once again tied the transferability of taxi plate licenses to the overarching regulatory goals of maintaining a safe and functioning taxicab industry for the benefit of the public. KPMG also recognized that a prohibition on transfers would be easily avoided and essentially impossible to enforce:

There are a number of suggestions, including that of the Taxi Task Force, that new Licenses should be “non-transferable”, eliminating the ability to trade the license and to realize the value. However, most jurisdictions have found preventing the transfer does not effectively prevent individuals from realizing the value.

The theory is that plate holders would have to return their plates when they leave the industry so they could be re-issued to new drivers. However, if that were the condition, no-one would ever indicate they have “left” the industry. They might be on vacation and leasing the plate to another driver in the meantime. If a limit was imposed on the length of vacation a plate holder could take; for example one month, then the plate holder could work a day a month. A number of enforcement quandaries would emerge. If a driver became ill, would they lose their license, or be allowed to lease it? How would illness (bad back?) be monitored? Finally, if a plate holder died, would they really be prevented from passing the plate on to a spouse or child – especially if the spouse or child was a taxi driver?

The only way to create an enforceable “no transfer” approach, would be to require that the plate holder, and only the plate holder, operate the cab. This would introduce a new series of issues. How would vacations and illnesses be managed? How would you ensure 24 hour a day availability of cabs if each cab was limited to only one driver? How many more plates would you need to ensure an adequate supply of cabs given the reduced use of

³⁸⁵ *Ibid*, p. F2277.

each cab? How would you adjust to the annual cycles of demand which tend to be handled now by having cabs operated longer hours in higher demand periods?³⁸⁶ [*emphasis added*]

304. KPMG's 2001 report was one of the inputs guiding the City's development and ultimate adoption of a harmonized taxi by-law, to replace the by-laws of the Predecessor Cities.

305. As a further input, on April 15, 2004, the City received a report from Hara Associates and KPMG dated entitled "Replacement for Taxi Cost Index and Review of Taxi Plate Numbers (the "**2004 TCI Report**")", intended in part to update the Taxi Cost Index ("**TCI**"), which is the basis on which the City sets meter rates. The Former City had initially adopted the TCI following the recommendation of the Hickling Report. The use of an index to govern regulated fares is a "common approach in regulated industries, so as to avoid either: a) additional expense to the regulator from directly monitoring the industry's costs; and/or b) the regulator having to rely on the industry to accurately and truthfully report its annual costs."³⁸⁷

306. Like KPMG's 2001 Report, as well as the various pre-amalgamation reports, the 2004 TCI Report once again identified consumer protection and public safety as the fundamental purposes of taxicab regulation. The executive summary described the purpose of taxi regulation, in part as follows:

For consumer protection, road safety and industrial peace, cities regulate their taxicab industries. This includes setting taxi meter rates and limiting the numbers of taxis permitted to operate. At present, there is a need to review the methods the City of Ottawa uses to determine rates and numbers of taxi licenses (or *plates*). [*emphasis added*]

307. Footnotes 4 and 5 to this paragraph elaborate that:

Consumers need regulatory protection on vehicle quality and meter rates because they are rarely in a position to judge quality in advance, and they may not be in a position to assess distance traveled or any other basis for determining a fair price. Regulation is also designed to promote road safety, limit traffic congestion and maintain industrial peace.

Limiting the number of taxis can be controversial, but the vast majority of cities do this. The City of Ottawa struggled with this issue after its amalgamation in 2001; it has elected to retain plate limits.³⁸⁸ [*emphasis added*]

³⁸⁶ *Ibid*, p. F2276-77.

³⁸⁷ Exhibit 170, Replacement for a Taxi Cost Index and Review of Taxi Plate Numbers, April 15, 2004, at p. A2147.

³⁸⁸ *Ibid*, at p. A2144

308. The first part of the 2004 TCI Report focuses on the development of a new TCI. The report states:

Since 1992, Ottawa has set meter rates with the help of a *Taxi Cost Index* (TCI). Use of the TCI is part of the by-law governing taxis in Ottawa. Similar in principle to the Consumer Price Index, the TCI measures increases in taxi-industry operating costs. There is concern that the TCI formula has become outdated and is not correctly capturing recent cost changes. Of particular concern have been the recent sharp increases in gasoline and insurance costs.³⁸⁹

309. The 2004 TCI Report recognizes that, although “the concerns of the industry must also be considered,” taxi rates are set by municipalities “for the benefit of the consumer.” It elaborates:

Cities regulate meter rates primarily in order to protect consumers. In the absence of regulations, passengers would often not be in a position to assess a fair price given the variable nature of the service in terms of both distance and quality of vehicle and driver. Regulated rates on meters provide a convenient set guide, and avoid situations of haggling or exploitation (as on a lonely street late at night). Ontario’s *Municipal Act* includes consumer protection as a ground for municipal by-laws and grants municipalities the power to set taximeter rates.³⁹⁰ [*emphasis added*]

310. On November 5, 2005, the City enacted its first harmonized taxi licensing by-law, the 2005 By-law. In the staff report to the Emergency and Protective Services Committee and Council recommending adoption of the 2005 By-law, staff described the then-proposed by-law as “regulat[ing] overall safety for both passengers and drivers and provid[ing] some measure of consumer protection.”³⁹¹

311. The preamble of the 2005 By-law itself echoes the staff report and cites the City’s authority under the *Municipal Act*, including the purposes for which the City may enact by-laws. It describes the purpose of the 2005 By-law as follows:

WHEREAS subsection 150(1) of the *Municipal Act, 2001*, S.O. 2001, Chap. 25, as amended, authorizes a municipality to license, regulate and govern any business carried out wholly or partly within the municipality;

AND WHEREAS section 155 of the *Municipal Act, 2001* provides further authority for the licensing, regulating and governing of the owners and drivers of taxicabs;

³⁸⁹ *Ibid*, at p. A2138.

³⁹⁰ *Ibid*, p. A2146.

³⁹¹ Exhibit 49: Report to EPSC and Council, August 22, 2005, p. F2332.

AND WHEREAS the *City of Ottawa Act (Taxicabs), 2001* permits City Council to define the area or areas within the City to which a by-law to license, regulate and govern the owners and drivers of taxicabs will apply;

AND WHEREAS subsection 150(2) of the *Municipal Act, 2001* provides that a municipality may only exercise its licensing powers for the purposes of health and safety, nuisance control or consumer protection;

AND WHEREAS City Council at its meeting of September 28, 2005 determined that it is appropriate to license taxicab drivers, taxicab plate holders and taxicab brokers for the purposes of health and safety and consumer protection to ensure an efficient taxicab service is available to all persons within the regulated area of the City of Ottawa and that such taxicab service is provided in a manner that provides a safe environment for both passengers and drivers;³⁹² [*emphasis added*]

312. Once enacted, the 2005 By-law maintained the key features of the taxicab regulatory regime that were already in place, being:

- (a) A prohibition on a person operating a taxicab without a license;
- (b) A prohibition on a person providing taxicab service unless the motor vehicle used has a current taxicab plate;
- (c) A prohibition on a person dispatching a taxicab without a license;
- (d) A limit to the number of licenses to be issued for motor vehicles to be operated as taxicabs;
- (e) Provisions under which the holder of a license to operate a taxicab may, after complying with any applicable requirements, transfer his or her license to another person;
- (f) A provision regulating the fare that a taxicab may charge to customers (based on the TCI established in the 2004 TCI Report);
- (g) A provision stating that all licenses, including taxicab plate licenses, are the property of the City;

³⁹² Exhibit 2, Tab 305, By-law 2005-481 (original), p. F3784.

- (h) A provision stating that taxicab licenses were for a fixed a term and renewable in accordance with conditions set out in the by-laws;
- (i) A fee for the transfer of a taxicab license to another person; and
- (j) A requirement that the transferor and/or transferee of a license, among others, provide the Former City with a duly executed copy of the written sale agreement between the proposed transferor and the proposed transferee containing the details of their dealings in respect of such taxicab, equipment, taximeter, good will, if any, and any other thing included in the sale agreement, along with a completed application for the transfer of the plate holder license.³⁹³

313. In examination in chief, Ms. Jones explained that the City's rationale for maintaining ownership of plate licenses involved the promotion of the fundamental purposes of public safety and consumer protection:

Q. That's okay. It's good to get firsthand information. Post amalgamation did the new City of Ottawa retain ownership of taxi plates and the value associated with taxi licenses?

A. Yes. The, we did.

Q. And why did the city retain ownership of the taxi plates and the value associated with the licensing?

A. Well, no different than, you know, prior pre-amalgamation, one of the important components of of regulation was the need for the city to control those plates. Right from the beginning of my career up until even today, the language has never really changed around the fact that the city retained the ownership of those plates and the value associated with it, and we did that for very good reason. We wanted to ensure, again, the ability to understand the service that was going on in in the public, how it was complementing the city's public transportation policies and recognizing the importance and the need that we continue to maintain ownership of those plates.

Q. And was that approach common to all the former municipalities?

A. It was.³⁹⁴ [*emphasis added*].

³⁹³ Exhibit 2, *supra* note 392.

³⁹⁴ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112 p. 9.

314. The 2005 By-law remained in place until it was repealed and replaced by the 2012 By-law. In preparation for the enactment of the new 2012 By-law, the City received a report from Hara Associates on August 22, 2011, entitled “Ottawa Taxi Cost Index 2011 Update”, which once again updated the TCI. In the section entitled “Policy Objectives and the Law”, the report reiterated, essentially verbatim, the rationale for the TCI expressed in the 2004 TCI Report: that while the concerns of the industry must be “considered,” “cities regulate meter rates to protect consumers.”³⁹⁵

315. The 2012 By-law maintained the regulatory regime established in the 2005 By-law, subject to specific amendments, which were relatively minor in nature. Indeed, the 2012 By-law was sufficiently similar to the 2005 By-law that the March 22, 2012 staff report to CPSC and Council recommended that Council: “re-enact the Taxi By-law (By-law 2005-481, as amended), as well as approve specific amendments thereto.”³⁹⁶

316. In her examination in chief, Ms. Donnelly explained why the enactment of the 2012 By-law was described as a “re-enactment” of the 2005 By-law:

Q. And you noted in your evidence a few moments ago that one of the primary issues here was the re-enactment of the taxi By-law 2005-481, with specific amendments. Why was that done versus enacting an entirely new by-law?

A. Well, we didn't need to have an entirely new by-law. This had been the subject of, of consultation and stakeholder engagement and staff review. And so what comes forward is, the regime is working well, re-enact the by-law, except with these, these new, kind of, new features of the by-law.³⁹⁷

317. Like the 2005 By-law, the preamble of the 2012 By-law identifies its purpose as ensuring health, safety, and consumer protection for “all persons” within Ottawa:

WHEREAS Section 151 of the Municipal Act, 2001, S.O. 2001, Chap. 25, as amended, authorizes a municipality to license, regulate and govern any business carried out wholly or partly within the municipality, and Section 10(2) of the Act also authorizes the City to pass by-laws for the health, safety and well-being of persons and protection of persons and property including consumer protection;

³⁹⁵ Exhibit 169, *supra* note 144, at p. A2114.

³⁹⁶ Exhibit 13: Report to CPSC and Council, March 22, 2005, p. F2376.

³⁹⁷ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 53, line 31- p. 54, line 8.

AND WHEREAS Section 156 of the Municipal Act, 2001 provides further authority for the licensing, regulating and governing of the owners and drivers of taxicabs;

AND WHEREAS City Council has determined that it is appropriate and desirable to license taxicab drivers, taxicab plate holders and taxicab brokers for the purposes of ensuring the health and safety of passengers and drivers alike, to ensure consumer protection, and to ensure that an efficient taxicab service is available to all persons within the regulated area of the City of Ottawa;³⁹⁸ [emphasis added]

318. The City's regulation of the taxi industry through the 2012 By-law necessarily involves provisions that will impact the economic circumstances of those who are granted licenses under the by-law, including measures that serve to regulate competition within the VFH industry. However, the purpose of the 2012 By-law is not to protect the economic interests of those granted taxi licenses. Rather, individual measures impacting the economic circumstances of licensees are necessary and incidental aspects of a broader regulatory regime whose primary purpose is to ensure public safety and consumer protection within the VFH industry.

319. As Ms. Donnelly explained in her examination in chief:

Q. All right. If the 2012 Taxi By-law does not focus on plate values in a secondary market, what is its primary focus? What is its focus? Excuse me.

A. Well, the *Municipal Act* allows the City to regulate this industry, or, or any industry, really, any business, for three purposes. Consumer protection, public safety, and nuisance control. So with respect to the taxi and limousine regulation, those purposes are for public safety and consumer protection. That's the, that is the — in the municipal world, the province giveth the authority and they taketh it away. And that is the, the authority the province giveth to the municipality to regulate.

Q. All right. And in terms of articulating what may be giveth, if we look at the Taxi By-law — and I'd like to go back to F3898. And I'm looking at the preamble of the Taxi By-law. And I'd ask you whether or not those objectives are set out in the preamble to the by-law?

A. They are.

Q. And can you assist the court as to where they are set out in the preamble?

A. If you look at the first resolution, which is the second paragraph, it speaks directly to section 151 of the *Municipal Act*, 2001, Chapter 25 as amended, which "authorizes a municipality to license, regulate, and govern any business carried out wholly or partly within the municipality. And then section 102 of the *Act* also authorizes the City to pass by-laws for the health, safety and well-being of persons and protection of persons and property, including consumer protection". And then it goes through the other authorities in *The Municipal Act*, specifically section 156, which actually prescribes and, and makes out

³⁹⁸ Exhibit 2, Tab 306, *supra* note 16, at p. F3898.

certain statements with respect to the authority for licensing, regulating, and governing the owners and drivers of taxicabs.

Q. And are the conditions of renewal or the issuance of taxi plates related to these principles?

A. Principles and authorities.

Q. All right. And how, how so?

A. Well, we, we, we can't make regulations beyond what the province allows us to do. And then — and I'm not, I'm....

Q. How, how do — let me put it another way.

A. Yes.

Q. How do the, how do the requirements of the by-law, with respect to renewal or issuance of taxi plates, relate or connect to the principles of driver safety, consumer protection, those things that you've spoken about?

A. Well, this is a whole regime. So I'm just going to illustrate it. You can go through each of the, kind of, specifications of the by-law. And so in the area of public safety and actually driver safety as well. So there are provisions like make sure the vehicles are safe. Make sure that they are of a certain age, that they have safety inspections, that — and in the case of this by-law, this changed later. But where it's, it's — you have to have air conditioning. You have to deal with driver comfort. You have to have a certain trunk size. You have to, kind of, keep current on the things for vehicle safety.

Q. All right.

A. And then there are similar provisions for drivers. So you'll have — so, so for the cabs, you have to have security cameras. You also have to have meters that can be seen and not tampered with, so that the consumer can see the rate that they're paying. There were a lot more provisions, but I'm not an expert.³⁹⁹ [*emphasis added*]

320. Similarly, in cross-examination, Ms. Donnelly explained that:

Q. Right. Okay. Okay. And, generally speaking, when, when the City is enacting this kind of by-law, the provisions that are in the by-law are intended to serve one of the more overarching objectives. Right? One or more.

A. It's a regime. So the regime in total is, is expected to do those things.⁴⁰⁰ [*emphasis added*]

321. Ms. Donnelly's evidence accords with the evidence of Ms. Jones, who explained in cross-examination that the City is not responsible for the financial earnings of any licensee, and instead seeks to create the regulatory conditions to ensure public safety and consumer protection:

³⁹⁹ Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 64, line 26 – p.66, line 25.

⁴⁰⁰ Leslie Donnelly, Cross-Examination, January 27, 2023, *supra* note 271, at p. 120, lines 24-29.

Q. Yeah. So, so in, in your regulation, in, in an effort to, to successfully achieve these objectives you make sure that the regulations are such so, so that the industry remains healthy economically?

A. To the best of our ability - it isn't always ultimately the ability to do it, I, and I can give you example of refreshment vehicles, at one point in time refreshment vehicles in the city could operate anywhere they want, you know, on streets and that created lots of problems, and you know city had to impose restrictions - again we aren't responsible for the financial earnings of any licensee, what we're responsible for is the public safety, consumer protection, elements of that, and ensuring that whatever rules are in place, that they're being upheld and at the same time when new, new changes come in....⁴⁰¹ [*emphasis added*]

(3) The City and its predecessors have retained ownership of taxi plates at all material times

322. Since at least the eve of amalgamation, and in many cases well before that, the taxi by-laws of the Predecessor Cities provided that the issuing municipality retained ownership of all taxi plate licenses, at all times.

323. By way of example, sections 39(1) and (2) of the City of Gloucester's Taxi By-law 1 of 1984 state:

39(1) No person shall enjoy a vested right in the continuance of any license and upon the issue, renewal, transfer, cancellation or suspension thereof, the license shall remain at all times the property of the Corporation`

39(2) every metal plate shall be and remain the property of the Corporation and shall be returned to the Corporation whenever required to do so by the Chief of Police.⁴⁰²

324. Gloucester's final taxi by-law enacted before amalgamation was 41 of 1998. Section 13(3) of that by-law states:

Notwithstanding any other provisions in the by-law, all taxi plates and validation stickers issued by the City shall remain the sole and exclusive property of the City at all times.⁴⁰³

325. Similarly, section 29(1) the City of Cumberland's Taxi and Limousine By-law number 56-99, enacted in 1999, stated:

⁴⁰¹ Susan Jones, Cross-Examination, February 9, 2023, p. 129, line 29- p. 130, line 11.

⁴⁰² Exhibit 2, Tab 320, *supra* note 98, at ss. 39(1) and (2), p. F4491.

⁴⁰³ Exhibit 2, Tab 315, *supra* note 98, at s. 13(3), p. F4292.

All licences issued by the municipality pursuant to this by-law shall remain the sole and exclusive property of the municipality.⁴⁰⁴

326. The City of Vanier was the focal point of Metro Taxi's business activities prior to amalgamation, and Metro held plate licenses there.⁴⁰⁵ Section 25(1) of the City of Vanier Taxi By-law number 33 of 1994 provided:

All licences issued by the municipality pursuant to this by-law shall remain the sole and exclusive property of the municipality.⁴⁰⁶

327. Section 25(1) Vanier's Taxi By-law 34-00, enacted in 2000 just before amalgamation, contained identical language.⁴⁰⁷

328. Section 32(f) of the City of Kanata's Taxicab By-law 3 – 82, enacted in 1982, provided:

No person shall enjoy a vested right in the continuance of a license and upon the issue, renewal, revocation, or suspension of a license, the license and any municipal plate shall remain the property of the city.⁴⁰⁸

329. The final taxicab licensing by-law enacted by the City of Kanata prior to amalgamation was 120-97, enacted in 1997. Section 21(1) of that by-law provided:

All licences issued by the municipality pursuant to this by-law shall remain the sole and exclusive property of the municipality.⁴⁰⁹

330. In the City of Nepean, sections 15(c) and 16 of By-law 28-67, enacted in 1967, provided:

15(c) Every number plate furnished by the chief of police under this section shall be and remain the property of the corporation and shall be returned to the corporation whenever required by the chief of police.

16) An owner's license and a taxicab broker's license issued under this by-law shall remain the property of the corporation and shall not be transferred, leased, or assigned in any manner whatsoever to any person by the holder thereof.⁴¹⁰

⁴⁰⁴ Exhibit 2, Tab 316, *supra* note 98, at s. 29(1), p. F4348.

⁴⁰⁵ *Ibid*, p. 76, lines 1-9.

⁴⁰⁶ Exhibit 2, Tab 310, *supra* note 98, at s. 25(1), p. F4156.

⁴⁰⁷ Exhibit 2, Tab 318, *supra* note 98, at s. 25(1), p. F4389.

⁴⁰⁸ Exhibit 2, Tab 322, *supra* note 98, at s. 32(f), p. F4526

⁴⁰⁹ Exhibit 2, Tab 314, *supra* note 98, at s. 21(1), p. F4268

⁴¹⁰ Exhibit 2, Tab 326, *supra* note 98, at ss. 15(c) and 16, p. F4457.

331. Nepean's final taxicab by-law enacted prior to amalgamation was number 115 of 2000. Section 21(1) of the by-law provided:

All licences issued by the municipality pursuant to this by-law shall remain the sole and exclusive property of the municipality.⁴¹¹

332. In the Former City, By-law L1, enacted in 1969, governed licensing for a number of business categories, including taxicabs. Section 15(1) of that by-law stated:

No person shall enjoy a vested right in the continuance of a license, and upon the issue, renewal, transfer, cancellation or suspension thereof, the value of a license shall be the property of the corporation.⁴¹²

333. The final taxi licensing by-law enacted by the Former City prior to amalgamation was By-law L6, enacted in 2000. Sections 26(1) and (2) of that by-law provided:

26(1) No person shall enjoy a vested right in the continuance of a license and upon the issue, renewal transfer, cancellation or suspension thereof, the value of a license shall be the property of the corporation.

26(2) Every metal plate shall be and remain the property of the corporation and shall be returned to the corporation whenever required to do so by the chief license inspector.⁴¹³

334. Metro Taxi held approximately 50 plates in the Former City prior to amalgamation.⁴¹⁴

335. The Current City's taxi by-laws enacted after amalgamation also retain the ownership of all plates and licenses, as well as the value of all plates and licenses, in the City. Section 93 of the 2005 By-law states:

93. (1) No person shall enjoy a vested right in the continuance of a license and upon the issue, cancellation or suspension thereof, the value of a license shall be the property of the City.

⁴¹¹ Exhibit 2, Tab 317, *supra* note 98, at s. 21(1), p. F4379.

⁴¹² Exhibit 2, Tab 309, *supra* note 98, at s. 15(1), p. F4080.

⁴¹³ Exhibit 2, Tab 330, *supra* note 98, at ss. 26(1) and (2), p. F4771.

⁴¹⁴ Marc André Way, Cross-Examination, January 10 2023, *supra* note 30, at p. 81, line 27 – p. 83, line 24.

(2) Every taxi plate furnished pursuant to this by-law shall be and remain the property of the City and shall be returned to the City or removed whenever required to do so by the Chief License Inspector.⁴¹⁵

336. Section 121 of the 2012 By-law, which replaced the 2005 By-law, contains identical language:

121. (1) No person shall enjoy a vested right in the continuance of a license and upon the issue, cancellation or suspension thereof, the value of a license shall be the property of the City.

(2) Every taxi plate furnished pursuant to this by-law shall be and remain the property of the City and shall be returned to the City or removed whenever required to do so by the Chief License Inspector.⁴¹⁶

337. Finally, the 2016 By-law, which replaced the 2012 By-law and which remains in force, contains the following provisions:

26(2) All standard taxi plates issued or continued under By-law No. 2005-481 or By-law 2012-258 shall be and remain the sole and exclusive property of the City at all times, and shall be returned to the City or removed whenever required to do so by the Chief License Inspector.

33(4) All accessible taxi plates shall be and remain the sole and exclusive property of the City at all times, and shall be returned to the City or removed whenever required to do so by the Chief License Inspector.⁴¹⁷

174) Licenses issued under this by-law are the property of the City and no person shall enjoy a vested right in the continuance of a license.

338. The conclusion evident from the text of the relevant by-laws – that the plaintiffs do not own the taxi plates – is supported by the relevant case law.

339. In *Saulnier v. Royal Bank of Canada*, the Supreme Court of Canada held that a license that conveys a right to participate in an activity exclusive to license holders (in that case, a commercial fishing license), and subject to the conditions of the license, only conveys a property interest in the fruits of the exploitation of the license, and not in the license itself.⁴¹⁸

⁴¹⁵ Exhibit 2, Tab 305, *supra* note 392, at s. 93, p. F3823.

⁴¹⁶ Exhibit 2, Tab 306, *supra* note 16, at s. 121, p. F3947.

⁴¹⁷ Exhibit 2, Tab 307, *supra* note 23, at ss. 26(2), 33(4) and 174, pp. F3974, F3977 and F4029

⁴¹⁸ *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 at paras 16, 23, 28, 34 and 43 [*Saulnier*].

340. In reaching this decision, the Supreme Court distinguished and critiqued the 1992 decision of the Ontario Court (General Division) (as it then was) in *Re Foster*, in which that Court held that a taxi owner's license constituted personal property which could be the subject of a security interest under the *Personal Property Security Act* (“PPSA”). In arriving at this decision, the General Division held that since the discretion of the issuing board to revoke the taxi license was reasonably fettered, the license conveyed a right resembling property.⁴¹⁹

341. In *Saulnier*, the Supreme Court criticized the Court's approach in *Re Foster*, writing that “there are no clear criteria to determine how much “fetter” on the issuing authority's discretion is enough to transform a “mere license” into some sort of interest sufficient to satisfy the statutory definitions in the BIA [*Bankruptcy and Insolvency Act*] and the PPSA.”⁴²⁰ Instead, the Supreme Court was clear that “it is extremely doubtful that a simple license could itself be considered property at common law.”⁴²¹

(4) The City's enforcement against “bandit” cabs

342. The City agrees with the plaintiffs' that it enacted “prohibitions and enforcement mechanisms as part of a package of enforcement tools” in order to “achieve its objectives in taxi regulation.”⁴²² However, the parties disagree over the issue of whether “ensuring that the taxi industry remains viable and protected from unlawful intruders on the closed plate system” was one of the purposes of enforcement.⁴²³

343. It is certainly clear that plate license holders view bandit cabs through the lens of their own financial interests and see these unlicensed competitors as, first and foremost, a threat to the perceived value of their investments. As Mr. Way articulated, the taxi industry's requests to the City were framed through this lens. Plate license holders wished to see the City's enforcement resources deployed to protect their investments:

⁴¹⁹ *Foster (Re)*, 1992 CanLII 7428 (Ont Gen Div) [Re Foster].

⁴²⁰ *Saulnier* at paras 36-40.

⁴²¹ *Ibid* at para 23.

⁴²² Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 202.

⁴²³ *Ibid*.

Q. And in the 2010's, did you have conversations about, with City officials about plate values?

A. Yes. We were talking about, we, we were talking about plate values and we were very concerned of the fact that there were a large number of, a significant number of banded [*bandit*] taxis operating. One in question, one in particular had actually set up a dispatch system, Quest Services, and we were insisting that by-law services effectively do something about it.

Q. What does plate values have to do with band[*it*] cabs?

A. It's that it basically allows someone to enter the market or enter the, the industry without having to follow rules, regulations, or invest in taxi plates.

Q. And what does that have to do with the plate values?

A. It diminishes the plate value.⁴²⁴

344. The City was aware that the taxicab industry was motivated to seek enforcement against bandit cabs because of the potential effect on its financial returns.⁴²⁵ However, this mere awareness is not evidence that the City undertook enforcement for the same reasons, or in pursuit of the same objectives, as the taxi industry.

345. To the contrary, as Ms. Jones explained in a 2007 interview with CBC, the City undertook enforcement against bandit cabs in order to protect public safety. In reference to Ms. Jones, the interview states:

The city is cracking down because "bandit" cabs pose a risk to the public, she said.

"You don't know if they're insured, and they wouldn't be insured as a taxicab ... you have no control over service issues," Jones said, adding that illegal taxis, which usually charge a flat rate, are typically more expensive than licensed cabs, their drivers are not trained by the city, and customers have no recourse if the drivers choose to drop them off some place they don't want to go.⁴²⁶ [*emphasis added*]

⁴²⁴ Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3 p. 130, lines 9-25.

⁴²⁵ Susan Jones, Cross-Examination, February 9, 2023, *supra* note 401, at p. 52:31- p.53:1.

⁴²⁶ Exhibit 194, "Ottawa cracks down on 'bandit' cabs," Sep 10, 2007, p. F472; Susan Jones, Cross-Examination, February 9, 2023, *supra* note 401, at p. 58, line 20 p. 59, line 6.

346. As Ms. Jones explained, bandit cabs were entirely unregulated in terms of vehicle standards, insurance and fares. At the time, the City viewed this lack of regulation as an unacceptable threat to public safety and consumer protection, and undertook enforcement activities accordingly.

347. In a May 14, 2008 report to the CPSC, City staff articulated a similar rationale. The report recommended that “the Chief License Inspector be required to work with the Taxi Stakeholders Consultation Group and the Taxi Industry to identify and implement a communications and enforcement strategy to eradicate the use of illegal underground taxicab services (e.g. Bandit Cabs)”. The justification for the recommendation describes bandit cabs as a “potentially unsafe illegal business practice,” and states that:

In the past few years, the By-law Enforcement and Regulatory Services Branch has laid several hundred charges and has closed several illegal businesses. In addition, a “Don’t Let The Bandit Take You For a Ride” campaign was implemented in 2006 to educate the public and businesses about the problems associated with taking illegal taxis.⁴²⁷

348. In short, the City enacted prohibitions and deployed enforcement resources against bandit cabs because they are not safe. The mere fact that the City’s enforcement aligned with the interest of the taxicab industry to see competition eliminated is not evidence that the City shared or adopted the industry’s objectives.

349. Ms. Donnelly provided a further example of the alignment of these interests. In her cross-examination, she explained that the City’s decision to move to a single taxi zone allowed it to redeploy enforcement resources that had previously been dedicated to policing taxi zone borders, and to focus those resources on bandit cabs instead. The taxi industry recognized the benefit of focusing resources on bandit cabs, as it would assist in preventing unlicensed competition. However, the City’s purpose in moving to one zone and redeploying enforcement resources was not to protect the taxi industry, but rather to promote consumer protection against potentially unsafe bandit cabs

Q. You only see that? Okay. Perfect. And so here, your report is talking about the harmonization of, of, of the, of the by-laws into one. And so we, we know that happened,

⁴²⁷ Exhibit 14, Report to CPSC, May 14, 2008, pp. A662-A663.

but a benefit of that or maybe one rationale for having that kind of system was it, it allowed by-law enforcement officers to focus on banded tabs as opposed to, you know, is this person in inappropriately working in this zone rather than that zone?

A. Yes. That, that was one of the benefits. Eliminated the deadheading, some of the other inefficiencies that actually were identified in the Hayden report.

Q. Right. Exactly. Exactly. So let's unpack that a little bit. So it's just — that heading, I, I, I know you discussed it yesterday, but it's just that we're all reminded of what it is. It was — if a, if a, if a taxicab driver was licenced in Kanata, and then went to Vanier that driver could drop a passenger off in Vanier, but could not pick up a different passenger from Vanier to go back somewhere else. Right?

A. Or anywhere along the way.

Q. Or anywhere along the way.

A. Yes.

Q. Right. And at that time, that caused efficiency problems.

A. For the industry, yes.

Q. For the industry. And, and for, for consumers, it must, it must have been frustrating for everybody.

A. Yes. Absolutely.

Q. Right. Exactly. And so council at that time was looking at, well, what's, what's the most efficient way of regulate — of — what's the best way of regulating the industry in order to make it more efficient and responsive to what consumers need?

A. Yes. I mean, and this is — I, I try very hard in my life not to be too pedantic, but there were — there will always be multiple goals related to public safety and consumer protection as issues are identified, things move forward. So the, the reviews when they happen try to respond to me — either new or no needs in those areas. So it's, it's almost never one thing.

Q. Right. Yeah. Exactly. It's —there's always more than one objective. But this was one of them at least.

A. Yes.

Q. Yes. Okay. Okay. And the issue of, of, of bandit cabs, that would have been a significant accomplishment at the time to, to, to allow by-law enforcement to focus on the, the real problem of bandit cabs as opposed to, is this taxi cab driver in the, in the wrong zone?

A. Certainly the industry recognized the benefit.

Q. Right.

A. I mean, at this — I mean, remember, we just enforce the, the — like the city staff just enforce the by-law.

Q. Right.

A. So if the by-law is focusing on zones and suddenly we don't — nobody has to worry about that, they can focus on the other issues.

Q. Exactly. Exactly. And that — the, the, the, the focus on — or the shifting of the focus from zones to the bandit cabs was also — it, it promoted consumer protection. Right?

A. Yes.

Q. It's — if, if....

A. Absolutely.

Q. If you have a taxicab that you, you don't know whether the, the car meets the requirements to be safe or what kind of background the driver has, there would always be a risk to a passenger getting into that car.

A. Exactly. [emphasis added]⁴²⁸

350. Once again, the plaintiffs advance a myopic interpretation of the evidence, and suggest that simply because plate license holders and the City both wanted to see enforcement against bandit cabs, it must necessarily have been for the same reasons. This interpretation is simply not supported by the evidence. The City undertook enforcement against bandit cabs in order to advance the purposes of its taxi regulation – to ensure that the industry operated in a manner that protected consumers and kept them safe.

III) Analysis: the statutory scheme does not give rise to a duty of care

(1) The purpose of the statutory scheme

351. The evidence overwhelmingly demonstrates that the 2012 By-law was enacted for the benefit of “all persons within the regulated area of the City of Ottawa”, and to ensure public health and safety and consumer protection.⁴²⁹

352. The key features of the 2012 By-law intended to achieve these purposes had been in place since before amalgamation. The key features of that regulatory regime – including a limit on plate licenses, the transferability of plate licenses, and the regulation of fares – were implemented to serve the general public good, and to ensure that the taxi industry operated in a manner that was safe for and protective of consumers.

353. The City of Ottawa is not unique in enacting a taxicab regulatory regime in which taxi plate licenses are both limited and transferable, and in which taxi fares are set by the municipality. Rather,

⁴²⁸ Leslie Donnelly, Cross-Examination, January 27, 2023, *supra* note 271, p. 78, lines 2 – 32 to p. 80, lines 1 – 4.

⁴²⁹ Exhibit 2, Tab 306, *supra* note 16, at p. F3898.

this model of regulation “is a common regulatory practice around the world.”⁴³⁰ As the Divisional Court recognized in *Eisenberg*, “[i]t goes without saying that a system of transferrable licences creates value in the licences.”⁴³¹ However, the value created in plate licenses is a by-product, rather than a purpose of the regulatory regime.

354. Indeed, if the purpose of the regulatory regime was to generate value for plate licenses on the secondary market, it would be illogical for the issuing municipality to retain ownership of the plate licenses. Rather, the retention of ownership permits the issuing municipality to recall or cancel the license if the requirements of the regulatory regime are not met. In other words, it is another tool to help promote consumer protection and public safety.

355. Similarly, the City’s enforcement activities against unlicensed “bandit” cabs that were not operating in compliance with the regulatory regime was undertaken to support the overall objectives of the City’s regulatory regime. As Ms. Jones highlighted, as early as 2007, bandit cabs were operating without having passed vehicle inspections, without any proof of insurance, without any controls over fares, and without any identification of or controls over the drivers.⁴³² As such, they were directly contravening overarching regulatory goals of consumer protection and public safety.

356. Thus, while the City’s regulation of the taxi industry through the 2012 By-law necessarily impacts the economic returns of licensees, the overall scheme is such that the City owes a general duty to the public as a whole.⁴³³ Similarly, to the degree to which the 2012 By-law regulates competition within in the VFH industry, this is an “incidental aspect” of the scheme as a whole, rather than a primary purpose, and is in the “overall public interest.”⁴³⁴

⁴³⁰ Exhibit 55, *supra* note 28, at p. F3090.

⁴³¹ *Eisenberg* (Ont Div Ct), *supra* note 339, at [para. 53](#).

⁴³² Exhibit 194, *supra* note 426, p. F472; Susan Jones, Cross-Examination, February 9, 2023, *supra* note 401, at p. 58, line 20 p. 59, line 6.

⁴³³ *Eisenberg* (Ont Sup Ct), *supra* note 339, at [para. 112](#).

⁴³⁴ *Unifor*, *supra* note 116, at [para. 13](#).

(2) ***Eisenberg* and *Vlanich* are highly persuasive authorities**

357. The plaintiffs attempt to distinguish *Eisenberg* on the basis that the statutory scheme at issue in that case is different “since Ottawa’s current by-laws are different than those in Toronto.”⁴³⁵ This argument is not persuasive. Although there are minor differences between the regulatory regimes embodied in Chapter 545 of the *Toronto Municipal Code* and the 2012 By-law, the core elements of the regimes are identical.

358. To begin with, both Chapter 545 and the 2012 By-law are detailed regulatory regimes enacted pursuant to discretionary enabling legislation. Chapter 545 was enacted pursuant to sections 6, 8, 10, 86 and 94 of the *City of Toronto Act*.⁴³⁶ The 2012 By-law was enacted pursuant to sections 8, 10, 151 and 156 of the *Municipal Act*.⁴³⁷ The two sets of enabling provisions are essentially identical.

<i>City of Toronto Act</i>⁴³⁸	<i>Municipal Act</i>⁴³⁹
<p>Scope of powers</p> <p>6 (1) The powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City’s ability to respond to municipal issues.</p>	<p>Scope of powers</p> <p>8 (1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality’s ability to respond to municipal issues.</p>
<p>Broad authority</p> <p>8 (1) The City may provide any service or thing that the City considers necessary or desirable for the public.</p> <p>City by-laws</p> <p>(2) The City may pass by-laws respecting the following matters:</p> <p>...</p> <p>6. Health, safety and well-being of persons.</p>	<p>Broad authority, single-tier municipalities</p> <p>10 (1) A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public.</p> <p>By-laws</p> <p>(2) A single-tier municipality may pass by-laws respecting the following matters:</p> <p>...</p> <p>6. Health, safety and well-being of persons.</p>

⁴³⁵ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11 at para. 242.

⁴³⁶ *Eisenberg* (Ont Sup Ct), *supra* note 339, at [para. 7](#).

⁴³⁷ Exhibit 2, Tab 306, *supra* note 16, at p. F3898.

⁴³⁸ *City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A*.

⁴³⁹ *Municipal Act, 2001, S.O. 2001, c. 25*.

<p>...</p> <p>8. Protection of persons and property, including consumer protection.</p> <p>...</p> <p>11. Business licensing.</p>	<p>...</p> <p>8. Protection of persons and property, including consumer protection.</p> <p>...</p> <p>11. Business licensing.</p>
<p>Scope of by-laws generally</p> <p>10 (1) Without limiting the generality of section 6 and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis the City considers appropriate.</p>	<p>Scope of by-laws generally</p> <p>8(4) Without limiting the generality of subsections (1), (2) and (3) and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis a municipality considers appropriate.</p>
<p>Powers re licences</p> <p>86 (1) Without limiting sections 7 and 8, those sections authorize the City to provide for a system of licences with respect to a business and,</p> <p>(a) to prohibit the carrying on or engaging in the business without a license;</p> <p>(b) to refuse to grant a license or to revoke or suspend a license;</p> <p>(c) to impose conditions as a requirement of obtaining, continuing to hold or renewing a license;</p> <p>(d) to impose special conditions on a business in a class that have not been imposed on all of the businesses in that class in order to obtain, continue to hold or renew a license;</p> <p>(e) to impose conditions, including special conditions, as a requirement of continuing to hold a license at any time during the term of the license; and</p> <p>(f) to license, regulate or govern real and personal property used for the business and the persons carrying it on or engaged in it.</p>	<p>Powers re licences</p> <p>151 (1) Without limiting sections 9, 10 and 11, a municipality may provide for a system of licences with respect to a business and may,</p> <p>(a) prohibit the carrying on or engaging in the business without a license;</p> <p>(b) refuse to grant a license or to revoke or suspend a license;</p> <p>(c) impose conditions as a requirement of obtaining, continuing to hold or renewing a license;</p> <p>(d) impose special conditions on a business in a class that have not been imposed on all of the businesses in that class in order to obtain, continue to hold or renew a license;</p> <p>(e) impose conditions, including special conditions, as a requirement of continuing to hold a license at any time during the term of the license; and</p> <p>(f) license, regulate or govern real and personal property used for the business and the persons carrying it on or engaged in it.</p>
<p>Licensing taxicabs</p> <p>94 (1) Without limiting sections 7 and 8, a by-law under those sections with respect to the owners and drivers of taxicabs may,</p> <p>(a) establish the rates or fares to be charged for the conveyance of property or passengers</p>	<p>Licensing taxicabs</p> <p>156 (1) Without limiting sections 9, 10 and 11, a local municipality, in a by-law under section 151 with respect to the owners and drivers of taxicabs, may,</p> <p>(a) establish the rates or fares to be charged for the conveyance of property or passengers</p>

<p>either wholly within the City or from any point in the City to any point outside the City;</p> <p>(b) provide for the collection of the rates or fares charged for the conveyance; and</p> <p>(c) limit the number of taxicabs or any class of them.</p>	<p>either wholly within the municipality or from any point in the municipality to any point outside the municipality;</p> <p>(b) provide for the collection of the rates or fares charged for the conveyance; and</p> <p>(c) limit the number of taxicabs or any class of them.</p>
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359. Further, the regulatory regimes embodied in Chapter 545 and the 2012 By-law, respectively, share the same key features:

- (a) Both regimes require taxi drivers to be licensed;
- (b) Both regimes regulate the fares that can be charged by taxicabs;
- (c) Both regimes require taxicabs to have a plate affixed to the vehicle, and prohibit the operation of taxicabs that do not have such a plate;
- (d) Both regimes limit the number of taxi plates;
- (e) Both permit the lease and transfer of taxi plates between licensees;
- (f) Both municipalities collected fees from plate license holders, including fees for the transfer of plates; and
- (g) Both regimes required that the purchase price of any transfer be reported to the municipality.⁴⁴⁰

360. Given the high degree of similarity between the two regulatory regimes, it is not reasonable for the plaintiffs to suggest that the *Eisenberg* decision should have no bearing on “how the 2012 By-law

⁴⁴⁰ *Eisenberg* (Ont Sup Ct), *supra* note 339 at [para. 32](#); Exhibit 2, Tab 306, *supra* note 16, at p. F3898.

affects the duty of care analysis” simply because it is “a decision from a different jurisdiction about a different by-law.”⁴⁴¹

361. Rather, the City submits that the *Eisenberg* decision represents a highly persuasive analysis of a regulatory regime with no material differences from the 2012 By-law. In particular, this Court should be persuaded by the conclusion of the Divisional Court that:

Indeed, as found by the motion judge, at para. 112, while Chapter 545 and 546 of the *Toronto Municipal Code* may have the effect of ameliorating the appellants’ financial circumstances, the scheme “does not create a positive duty to enforce Chapter 545 or Chapter 546 to achieve health and safety outcomes and there [is] no obligation to protect the economic interests of those granted taxi licences”. Rather, as with many other regulatory schemes, the purpose of these by-laws is to protect the public as a whole and not the private economic interests of the appellants.⁴⁴² [*emphasis added*]

362. Furthermore, it is notable that the plaintiffs entirely fail to address the Ontario Court of Appeal’s decision in *Vlanich* (which was heavily relied on by the Court in *Eisenberg*). *Vlanich* too involved the analysis of taxicab licensing regime enacted, like the 2012 By-law, under the enabling provisions of the *Municipal Act*. As outlined above, in *Vlanich*, after analyzing the relevant taxi by-law, the Court of Appeal concluded that the purpose of the by-law was to benefit the public as a whole, and did not give rise to a duty of care on the part of the municipality to prevent losses caused by the noncompliant conduct of third parties.⁴⁴³

363. The plaintiffs’ claim falls squarely within the authority of *Cooper* and *Edwards*, and the more recent and specific authority of *Vlanich* and *Eisenberg*. The statutory scheme does not create a positive duty on the part of the City to enforce the 2012 By-law to achieve the by-law’s stated purposes, much less to do so for the purpose of protecting the economic interests of those who are granted taxi plate licenses.⁴⁴⁴

⁴⁴¹ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 243.

⁴⁴² *Eisenberg* (Ont Div Ct), *supra* note 341, at para. 48.

⁴⁴³ *Vlanich*, *supra* note 346, at para. 30.

⁴⁴⁴ *Vlanich*, *supra* note 346, at paras. 34-39; *Eisenberg* (Ont Sup Ct), *supra* note 339, at para. 112; *Eisenberg* (Ont Div Ct), *supra* note 341, at para. 48.

B) Duty of care arising from proximity

I) Legal principles – requirements for proximity sufficient to found a duty of care

(1) There must be close and direct interactions beyond the ordinary scope of the regulatory relationship

364. Where the statutory scheme does not impose a duty of care, proximity sufficient to establish a duty of care will only arise where there have been “close and direct” interactions between the plaintiff and the public authority.⁴⁴⁵

365. The “typical factors” that have led courts to find proximity include:

[A]ny representations made by the defendant, especially if made directly to the plaintiff, reliance by the plaintiff on the defendant's representations, the nature of the plaintiff's property or other interest engaged, the specific nature of any direct contact between the plaintiff and the defendant, and the nature of the overall relationship existing between the plaintiff and the defendant.⁴⁴⁶

366. Typical examples of these interactions include “advice or directions” from the authority to the plaintiff, or direct “commercial dealings” between the authority and the plaintiff.⁴⁴⁷

367. The critical aspect of the analysis is that the interactions must go beyond the ordinary scope of the regulatory relationship. Proximity sufficient to found a duty of care will not arise “when the regulator is simply discharging [its] statutory responsibilities in the public interest.”⁴⁴⁸

368. Similarly, “where the interactions fall within the scope of the public authority's statutory role, without anything more, those interactions cannot form the basis for finding that the regulator owes a private law duty of care to parties subject to the regulatory oversight.”⁴⁴⁹

⁴⁴⁵ *Imperial Tobacco*, *supra* note 341, at [para. 50](#); *Taylor*, *supra* note 344, at [para. 79.](#); *Vlanich*, *supra* note, *supra* note 346, at [para. 39](#)

⁴⁴⁶ *Taylor*, *supra* note 344, at [para. 69](#), cited in *Williams*, *supra* note 340, at [para. 35.](#);

⁴⁴⁷ *Eisenberg* (Ont. Sup. Ct.), *supra* note 399, at [para. 123](#).

⁴⁴⁸ *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 579 at [para. 48](#), citing *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34, at [para. 51](#).

⁴⁴⁹ *Eisenberg* (Ont Div Ct), *supra* note 341, at [para. 52](#).

369. Rather, in order to establish proximity sufficient to find a duty of care, the plaintiffs must prove that they had specific, close and direct interactions with the City that are outside the ordinary scope of the City's statutory role.⁴⁵⁰ If the factors alleged to give rise to proximity are "generic and inherent in the regulatory framework",⁴⁵¹ or, put differently, a "manifestation of the regulator/regulated relationship," then proximity will not be established.⁴⁵²

370. This standard is not displaced simply because the regulator is fulfilling its role in the context of a supply-managed industry.

371. In *River Valley Poultry Farm*, the plaintiff, a participant in the supply-managed egg-producing industry, brought a claim for negligent investigation against the Canadian Food Inspection Agency and Health Canada. The Court of Appeal dismissed the claim on the basis of lack of proximity, holding that the government's mere fulfillment of its role under the statutory regime is not enough to establish proximity:

I accept that when a government agency targets an enterprise for investigation that might suggest some relationship between the two. But proximity under the Anns test requires something more: it requires a sufficiently close and direct relationship, making the imposition of a private duty of care fair and just. Mere targeting in the context of a statutory regime under which a government agency is responsible for preventing and controlling the spread of disease in the interest of animal and public health is not enough to establish proximity.⁴⁵³ [*emphasis added*]

372. Similarly, in *Flying E Ranche Ltd.*, the plaintiffs brought a class action on behalf of all Canadian cattle farmers – including those who participated in the supply-managed dairy farm industry – alleging that the Government of Canada negligently failed to keep Bovine Spongiform Encephalopathy ("BSE" or "mad cow disease") out of the country. In dismissing the claim, the Court found that neither the statutory framework, nor the regulator's actions within the context of that statutory framework, gave rise to proximity sufficient to find a duty of care:

⁴⁵⁰ *Aylmer Meat Packers Inc.*, *supra* note 448, at para. 51.

⁴⁵¹ *Wu v. Vancouver (City)*, 2019 BCCA 23, at para. 64.

⁴⁵² *Eisenberg* (Ont Div Ct), *supra* note 341, at para. 53.

⁴⁵³ *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, at para. 59.

...although damage to the Class was foreseeable by Canada (indeed, Canada was conscious of the potential harm BSE could cause), the statutory framework and the interactions between Canada and the Class do not create a relationship of proximity such that a duty of care should be recognized. The relevant statutes, in particular the Animal Disease and Protection Act, R.S.C. 1985, c A-13 (“ADPA”), the Health of Animals Act, S.C. 1990, c. 21 (“HAA”), and the Feeds Act, R.S.C., 1985, c. F-9, (“Feeds Act”), have broad public purposes and do not create a duty of care between Canada and the cattle-producing industry. Nor was there a “special relationship” between Canada and the Class arising from interactions between them. At various points in the period of the relevant events in the 1990s Canada consulted, and had close contacts with the cattle farming industry, but in doing so it was engaging in its role as a responsible regulator acting in the public interest under its broad statutory mandate. While many steps taken by Canada were directed at the cattle industry, those actions did not create a special relationship with members of the Class.⁴⁵⁴ [*emphasis added*]

373. Most relevant to the instant case, in *Eisenberg*, the Divisional Court evaluated a claim brought in the context of a taxicab licensing regime based on a supply management model substantially identical to that of Ottawa, in that the City of Toronto: (1) limits the number of available taxi plate licenses; (2) permits those licenses to be transferred for consideration on the secondary market; and (3) sets taxi fares. Once again, the Divisional Court applied the same standard for proximity, holding that the interactions relied on by the plaintiffs to establish proximity were simply a manifestation of the regulator/regulated relationship.⁴⁵⁵

374. The standard of close and direct interactions outside of the regulatory relationship is a high bar, as illustrated by the recent Court of Appeal decision in *Aylmer Meat Packers*.

375. In that case, officials from the Ontario Ministry of Agriculture, Food and Rural Affairs seized control of an abattoir owned by Aylmer Meat Packers (“AMP”), based on reasonable suspicion of ongoing breaches of the *Meat Inspection Act* and other statutory requirements. The Ontario Court of Appeal held that the Ministry subsequently entered into a close and direct relationship with AMP, through “specific interactions” including: suspending AMP’s abattoir license while failing to hold the prescribed hearing; restricting access to the abattoir by AMP’s employees; and failing to maintain the abattoir’s

⁴⁵⁴ *Flying E Ranche Ltd. v. Attorney General of Canada*, 2022 ONSC 601 at para. 17.

⁴⁵⁵ *Eisenberg* (Ont Div Ct.), *supra* note 341, at paras. 52-53.

freezer, causing the meat inside to spoil and eventually be destroyed. When the abattoir was returned to AMP 19 months after its seizure, AMP's business had been effectively destroyed.

376. Under the circumstances, sufficient proximity arose because “[t]hese specific interactions were not the ordinary day-to-day regulatory contacts between Ministry personnel and a regulated abattoir.”⁴⁵⁶

(2) Representations and consultations

377. Although the plaintiffs have not pled negligent representation, they do rely on alleged representations by the City and “collaboration between the City and Class Members” as circumstances that “enhanced” their “relationship of proximity” with the City.⁴⁵⁷ As such, the principles underpinning the analysis negligent misrepresentation are relevant to an evaluation of their claim.

378. To begin, general representations made by a regulator to the public, and relied on by the plaintiffs as members of the public, do not give rise to proximity sufficient to find a duty of care. These types of general representations include “a regulator's public acknowledgement of its public duties to those affected by its actions, coupled with reliance by those affected on the regulator's public statements.”⁴⁵⁸

379. Rather, a relationship of proximity is only created where the defendant specifically undertakes to do something, and this undertaking induces reasonable and detrimental reliance by the plaintiff. Any reliance which falls outside of the purpose for which the representation was made or the service was undertaken necessarily falls outside the scope of the proximate relationship and therefore, of the duty of care.⁴⁵⁹

380. Undertakings may not be given at large, or “implicitly.” There must be an express undertaking or representation, and it is the intended effect of the defendant's undertaking that brings the defendant into

⁴⁵⁶ *Aylmer Meat Packers*, *supra* note 448, at [para. 51](#).

⁴⁵⁷ Amended Amended Statement of Claim, *supra* note 2, at para. 19, pp. B-1-5681-82.

⁴⁵⁸ *Taylor*, *supra* note 344, at [paras. 95](#) and [118](#); *Flying E Ranche*, *supra* note 454, at [paras. 599-600](#).

⁴⁵⁹ *Charlesfort Developments Ltd. v. Ottawa (City)* 2021 ONCA 410 at [paras. 36-38](#).

a relationship of proximity and duty with the plaintiff.⁴⁶⁰ The undertaking must be outside the bounds of the standard regulatory relationship.

381. By way of example, in *Imperial Tobacco*, the Supreme Court held that the pleadings disclosed a *prima facie* duty of care in negligent misrepresentation, on the basis that the Government of Canada had provided specific advice to tobacco manufacturers, separate and apart from its regulatory duties towards the tobacco industry. Chief Justice McLachlin, writing for a unanimous court, explained:

What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, A.R., vol. II, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (*ibid.*, at pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.⁴⁶¹ [*emphasis added*]

⁴⁶⁰ *Charlesfort Developments Ltd. v. Ottawa (City)* 2021 ONCA 410 at para. 47.

⁴⁶¹ *Imperial Tobacco*, *supra* note 341,.

382. In contrast, in *Eisenberg*, the Divisional Court held that Toronto's public acknowledgement that it was aware of the value of taxi plate licenses was not the type of specific advice or representation that gives rise to proximity outside the confines of the regulatory framework. The Court explained that:

It goes without saying that a system of transferrable licences creates value in the licences. The City's acknowledgement that it was aware of this value and its collection of fees for the transfer is not sufficient to create a relationship of proximity. There will necessarily be interactions between a regulator and those who are regulated. A casual comment about the value of a license cannot be sufficient to create a "special relationship".⁴⁶²

383. Indeed, the Divisional Court contrasted the plaintiffs' claims in that case with those raised in *Imperial Tobacco*, and held that that one of the factors evidencing a lack of sufficient proximity was that "there is no allegation that the City provided any kind of expert advice or direction to the appellants or that the City was involved in the appellants' commercial enterprise other than through the collection of fees."⁴⁶³

384. General consultations between the regulator and the industry will not establish proximity, absent proof of the type of specific representations or advice identified in the *Imperial Tobacco*. In *Flying E Ranche*, the Ontario Superior Court held that:

Governments are expected to consult with those affected by their actions and do so frequently, especially with regulated industries. This is not to ensure, however, that government is doing what an industry wants or is acting in the interests of that industry, but to ensure that government is acting in the public interest on the best information available.⁴⁶⁴ [*emphasis added*]

385. In short, and in light of these authorities, in order to establish proximity sufficient to find a duty of care, the plaintiffs must prove specific, close and direct interactions with the City – typically in the form of specific advice or commercial dealings – that are outside the confines of the City's regulatory duties or the plaintiffs' participation in the regulatory regime. No such interactions occurred in the present case.

⁴⁶² *Eisenberg* (Ont Div Ct), *supra* note 341, at para. 53.

⁴⁶³ *Ibid* at para. 55.

⁴⁶⁴ *Flying E Ranche Ltd.*, *supra* note 454, at para. 614.

II) Evidence

(1) The enactment of the statutory regime

386. The plaintiffs identify three tenets of the regulatory regime that allegedly give rise to proximity sufficient to find a duty of care: (1) the limit on taxi plate licenses; (2) the transferability of taxi plate licenses for consideration; and (3) the setting of fares.⁴⁶⁵

387. It is not contested that these tenets of the regulatory regime have been in place in Ottawa since “in or around 1960.”⁴⁶⁶

388. The 2012 By-law contains, amongst other provisions, these three regulatory tenets. It is not contested that in enacting the 2012 By-law, the City was acting in its statutory role and within its jurisdiction as the regulator of the taxicab industry, pursuant to its delegated authority under the *Municipal Act*. The parties agree that:

The City has, since amalgamation, exercised its powers to enact by-laws with respect to taxicab and limousine services.

The City is the regulator that determines the by-laws and policies governing the taxicab industry.⁴⁶⁷

389. In cross-examination, Mr. Way gave the following evidence:

Q. Thank you. All right. Now, I understand, sir, that — well, nothing to understand, the fact is, the City is the regulator of the taxi industry, do you agree with that?

A. Yeah. Yes, I do.

Q. All right. And it has a duty to regulate the taxi industry?

A. Yes.⁴⁶⁸ [*emphasis added*]

390. The facts agreed as between the parties echo the finding of Justice de Sousa in *Unifor*, who wrote that “the City, on a longstanding basis, has exercised its powers to enact by-laws with respect to

⁴⁶⁵ Amended Amended Statement of Claim, *supra* note 2, para. 19(a), (d), (e) and (f) pp. B-1-5681-82.

⁴⁶⁶ Amended Amended Statement of Claim, *supra* note 2, at para. 7, p. B-1-5677.

⁴⁶⁷ Statement of Agreed Facts, *supra* note 1, at paras. 4-5, p. F1.

⁴⁶⁸ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 87, lines 18-24.

taxi cab services, as well as with respect to limousine services under a separate regulatory regime, within its jurisdiction.”⁴⁶⁹

391. For the reasons set out above, the evidence demonstrates that the City enacted limits on taxi plate licenses and set fares for taxicab service in order to establish standards for the benefit of the general public, particularly with regard to public safety and consumer protection.

392. As further set out above, the evidence demonstrates that the value of plate licenses on the secondary market arises as a result of the City’s limitation of plates, rather than as a result of those plates being transferable. Even if the plates were not transferable, they would be a valuable commodity, as they would allow participation in an otherwise inaccessible monopoly. As such, if the value of the license could not be realized through a transfer on the secondary market, it is likely that plate license holders would find some way to realize the value of those licenses.

393. The evidence outlined above demonstrates that the City’s decision to maintain the transferability of plates served the overarching goals of ensuring a safe, effective taxicab industry for the benefit of the public by:

- (a) Helping to ensure adequate taxicab service 24 hours a day; and
- (b) Ensuring that the City could avoid having to allocate scarce enforcement to police the transfer of plates.

(2) The City’s regulatory role for license issuance and transfers

394. The plaintiffs primarily interacted with the City through the BLRS branch, which is a branch of the City’s Emergency and Protective Services Department.⁴⁷⁰ BLRS administers and enforces dozens

⁴⁶⁹ *Unifor*, *supra* note 116, at [para. 12](#).

⁴⁷⁰ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 126, lines 6-13.

of by-laws, including the City's Business Licensing By-law, its Property Standards By-law, and, at the relevant time, the 2012 By-law (BLRS now administers and enforces the 2016 By-law).⁴⁷¹

395. BLRS' enforcement activities with respect to the 2012 By-law will be discussed below, in the context of the standard of care. With respect to licensing, BLRS was charged with the issuance and renewal of the various licenses required under the 2012 By-law (including standard and accessible driver licenses, standard and accessible plate holder licenses, and broker licenses) in accordance with the conditions set out in the by-law.⁴⁷²

396. In order to legally operate as a licensed taxicab under the 2012 By-law, the operator of the taxicab required either a standard or accessible plate holder license. At the time that the 2012 By-law was in force, the City was no longer issuing new standard plate holder licenses, and indeed had not issued any new such licenses since amalgamation in 2001.⁴⁷³ As such, the 2012 By-law only provides for the renewal of standard plate licenses, rather than application for new licenses. Those requirements are set out at section 17.⁴⁷⁴ Ms. Hartig explained the process of license renewal in accordance with section 17 as follows:

Q. All right, thank you. Now, once by-law and regulatory services receives an application for renewal, what is the process, is there a process of evaluation in terms of that renewal?

A. Yes. So, we're talking about plate holder, correct? So, we would review all of the documents that are submitted, make sure they're in order. I'm just going to go back to the original section here. I've dealt with a lot of different by-laws since then.

Q. Section 17(2).

A. Thank you. There's going to be a lot of time taking me scrolling. Okay. Excuse me. So, they — they're completing the application form, which as I said is, is — it's inputted directly into the system by one of our licensing admin staff. They provide letters of incorporation. If there's a partnership, the names and addresses of each member of the partnership. Their proof of insurances. Their current valid motor vehicle permit. A valid taxi cab driver license because the plate holder licensees must also hold a valid taxi cab driver license, so that would take us to another section of the by-law, where that would be — they do — the requirements would be set out there.

⁴⁷¹ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p.78, line 29 – p. 79, line 1.

⁴⁷² *Ibid*, p. 80, lines 4-30.

⁴⁷³ Statement of Agreed Facts, *supra* note 1, at para. 20, p. F4.

⁴⁷⁴ Exhibit 2, Tab 306, *supra* note 16, at s. 17, pp. F3907.

Q. And if we turn to section 19 — I'm sorry, section — sorry, section 17. That — those are the items that are required for renewal, correct?

A. Yes, and they would also if they — if they have the same vehicle then there's no vehicle inspection requirements until the fall, I believe. Or if there's a, a change in the meter rate.⁴⁷⁵

397. The 2012 By-law does, however, provide for the issuance of new accessible plate holder licenses, along with the renewal of existing licenses. Those requirements are set out at section 19. Ms. Hartig explained that process as follows:

Q. All right. And if we look at section 19(1), are those the requirements for a renewal with respect to an accessible taxi plate holder?

A. Yes.

Q. And how is that type of a renewal application evaluated or processed?

A. Similar to the, the standard. One of the main differences here is, of course, it's a fully wheelchair accessible vehicle.

Q. And what steps are taken at by-law and regulatory services with respect to the information that is submitted?

A. So, again, all the documents are reviewed for accuracy, complete — completeness and so on and same with here that the plate — the accessible plate holder licensee also must have an accessible taxi cab driver license, as well.⁴⁷⁶

398. Sections 91(2) and 92(2) of the 2012 By-law provide that either a standard or accessible plate license, respectively may be transferred between licensees provided that the proposed transferee complies with the following provisions:

(2) The proposed transferee shall provide the Chief License Inspector with the following:

(a) a completed application for the transfer of the standard taxi plate holder license;

(b) proof that the proposed transferee complies with the provisions of the by-law as if the proposed transferee was an original applicant by providing the information required by Section 15;

(c) the license transfer fee as set out in Schedule "C";

(d) a duly executed copy of the written sale agreement between the proposed transferor and the proposed transferee containing the details of their dealings in respect of such taxicab, equipment, taximeter, good will, if any, and any other thing included in the sale agreement; and,

⁴⁷⁵ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, p.94, line 22 – p. 95, line 18.

⁴⁷⁶ *Ibid*, p, 95, line 27 – p. 96, line 9.

(e) two (2) affidavits, one made by the proposed transferor and the other made by the proposed transferee setting out the true consideration for the taxicab, equipment, taximeter, good will, if any, and any other thing included in the sale agreement.⁴⁷⁷

399. In order to effect a transfer, the transferee and transferor would physically attend at the BLRS counter, to fill out the required documentation and pay the required transfer fees.⁴⁷⁸

400. The plaintiffs allege that proximity arises on the basis that “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.”⁴⁷⁹ However, through the Statement of Agreed Facts, the parties agreed that the City’s role with respect to plate transfers was limited as follows:

The City’s involvement in taxi plate transfers was limited to regulatory oversight of the reported transfer within the scope of the by-law and for the collection of transfer fees payable to the City of Ottawa. The transfer fee was set by the City’s in-force taxi by-law and was payable to the City over and above the consideration paid between the license transferor and transferee.⁴⁸⁰

401. In examination-in-chief, Ms. Hartig expanded on the limited role played by BLRS with respect to plate transfers:

MR. BURKE: Q. And what is by-law and regulatory services role with respect to such transfers?

A. So, our role is to ensure that the transferee complies with the by-law, as in, you know, goes through the process of, of becoming a licensee or a plate holder license — a taxi plate holder licensee and also a driver, a taxi cab driver licensee.

Q. And is there a fee charged by the City with respect to the taxi plate license transfer?

A. Yes.

Q. Okay. And who pays that fee?

A. The transferee.

Q. Now, does by-law services undertake any other activities with respect to when a transfer occurs other than the processing of the, the paperwork that you’ve spoken about?

A. We also inspect the vehicle.

⁴⁷⁷ Exhibit 2, Tab 306, *supra* note 16, ss. 91(2) and 92(2), pp. F3935-F3936.

⁴⁷⁸ Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 125, lines 20-27.

⁴⁷⁹ Amended Amended Statement of Claim, *supra* note 2, at para. 19(g).

⁴⁸⁰ Statement of Agreed Facts, *supra* note 1, at para. 21, p. F5.

Q. And what does the inspection of the vehicle entail?

A. So, again, our, our by-law is the Bible for all these things, so the vehicles presented by the, by the participants or the parties and there are a number of provisions in the by-law that outline all the requirements of the vehicle and, you know, we would look at things like, you know, roof signs, the condition of the vehicle. They have to provide a safety standards certificate. You know, there's identifiers on the, like the number on the side of the vehicle, so that passengers can identify it and as I said the roof sign. There's quite a number of requirements; cleanliness, so on and so forth.

Q. And are those requirements set out in the by-law?

A. Yes, they are.

Q. All right. Now, with respect to the information, if we look at section 91(2)(b) and (e), is this information received by by-law and regulatory services?

A. Yes, it is.

Q. And what measures does the City take to independently verify that the written sales agreement set out in section 91(2)(d) reflects the true details of the transfer?

A. Well, there's very little we can do to verify. We, we take it on face value. They also provide two affidavits, so one for each, one for the transferor and one for the transferee setting out a number of factors and we maybe stupidly sometimes assume that it's, it's all accurate...

Q. Okay.

A. ...and in order.

Q. All right. Now, does the City have any involvement as to what that value is exchanged between the transfer or and the transferee?

A. No.

Q. And does the City's role with respect to the transfer of accessible plate license differ from the transfer of a standard plate license?

A. No.⁴⁸¹

402. In cross-examination, Mr. Way agreed that the City does not independently verify the information the transferees submit, and that the transfer value reported to the City does not always reflect the true value exchanged between transferee and transferor:

Q. And you know that under the 2005, 2012, and 2016 by-law that the municipality requires the transferee to record with the City the amount paid in relation to the transfer of the plate?

A. Yes.

Q. And you were also aware based on your experience that the City does not take active steps to verify that information?

⁴⁸¹ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 96, line 26 – p. 98, line 13.
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A. You have to present the sale — the, the, the agreement between the two parties. And on that agreement, the purchase or sale price is indicated.

Q. Right. But you've, you've said in your evidence that sometimes that doesn't always reflect the true value.

A. I, I agree with that.

Q. And you agree with me that the City doesn't go beyond or behind the Bill of Sale or the affidavit that might be tendered by the transferee to verify that indeed that is the case?

A. You are correct.⁴⁸² [*emphasis added*]

403. A regulatory interaction in which the City merely records the reported value of a plate transfer, without taking any steps to verify the truth of the reported value, clearly falls within the ordinary scope of the regulatory regime, and as such does not give rise to proximity sufficient to find a duty of care.⁴⁸³

(3) The plaintiffs routinely reported false transfer values to the City

404. The argument that proximity does not arise out of the City's mere requirement for and recording of the reporting of plate transfer values is strengthened by the ample evidence that transferees of plate licenses routinely reported inaccurate transfer values to the City, notwithstanding the requirements of the City's taxi by-law. In fact, all of the plaintiffs' fact witnesses other than Mr. Way admitted to either reporting false transfer values or knowingly participating in the practice.

405. On April 24, 2003, the plaintiffs' fact witness Ziad Mezher executed and filed with the City an affidavit stating that "I am purchasing the taxi plate # 840 from Milad Eid, for the sum of \$20,000.00."⁴⁸⁴

406. However, Mr. Mezher's evidence was that he in fact purchased his plate license from a different party for \$50,000, and that the transfer from Mr. Eid to himself was part of a two-step transfer scheme to avoid the requirements for minimum years of service which were in force at the time for Gloucester plates:

Q. Okay. Okay. And how much, how much did you pay for your plate?

A. Fifty thousand.

⁴⁸² Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 139, line 32 – p. 140, line 19.

⁴⁸³ *Aylmer Meat Packers Inc.*, *supra* note 448, at [para. 51](#).

⁴⁸⁴ Exhibit 66, Plate Transfer filings – Ziad Mezher, p. F1137.

Q. Fifty thousand. And do you know when the documents that were submitted to the city were done, was the amount that was reflected in the documents?

A. When I bought my plate in Gloucester, I made the deal with the owner, he's called Joe, Joe Koziezian(ph) or Kollegian(ph), I'm not really sure about his last name. We agreed on 50,000. I paid him half of the price and the rest will be after we transfer the plate to my name. When we gone to the city to do everything after we did at the lawyer and we agreed on the amount and everything, she told me you can't have the plate under your name because you're supposed to have, I believe, three years of service in Gloucester. I offer Joe to keep the plate in his, his name and we transfer after. He didn't like it, so I need a person to put the plate under his name. I ask Milad Eid. Milad Eid is the owner of Taxi De Ville and I know him from back home. I put the plate under Milad Eid's name, and I paid the fee for the city. The city, they have a fixed, a fixed price. It's, I would say, 2,000 or 3,000 at that time. I paid the fee at first and I transferred the plate after three years from Milad Eid to my name and I pay again the price of transfer. So we cut the price, I cut the price in a way in two portions, in two amounts. First, between Joe and Milad, second, between Milad and myself.

Q. Okay. Okay. So the, the, the document that would have your name, the, the transfer from Milad to you would have a number that is lower than \$50,000?

A. Yes.⁴⁸⁵

407. On October 22, 2007, the plaintiffs' fact witness Mr. Dadi executed and filed with the City an affidavit stating that he was purchasing "taxi plate/ license no. 299" "at a price of \$199,689.54," and that "the sale price herein is under a bona fide transaction."⁴⁸⁶ Notwithstanding the content of this affidavit, Mr. Dadi gave the following evidence when asked how much he paid for his plate license:

Q. Okay. So, so did, did you buy your own taxi plate?

A. Yes.

Q. Yes. Around what year did you buy?

A. I buy my plate in 2007.

Q. Okay. How much did you pay for your....

A. Around the \$210 - \$210,000.⁴⁸⁷ [*emphasis added*]

408. When shown his plate transfer documents and asked about the discrepancy, Mr. Dadi gave the following evidence:

Q. Okay. And then if we go - so you paid - sorry. If we go back up, we see the transfer price. And so that - now, I heard you tell my friend, Mr. Rucci, that you paid about \$210,000.

⁴⁸⁵ Ziad Mezher, Examination in Chief, January 18, 2023, *supra* note 26, at p.7, line 7 – p.8, line 4.

⁴⁸⁶ Exhibit 81, Yeshitla Dadi Plate Transfer Documents, October 22, 2007, p. F1129.

⁴⁸⁷ Yeshitla Dadi, Examination in Chief, January 23, 2023, *supra* note 26, at p.102, lines 10-17.

A. Mm-hmm.

Q. But is that - so this only says \$199,689.54.

A. Yeah.

Q. So is - is that what you would have paid? Or, or were there....

A. No. I just - I, I, I gave him some cash for the guy.

Q. Oh, you gave them cash...

A. Yeah.

Q. ...on top...

A. Yeah. Yes.

Q. ...of that.

A. Yes.

Q. Okay. How much cash do you give him?

A. Just – here, I gave him one - \$199,000.

Q. Right.

A. So I gave him around the 10,000.⁴⁸⁸ [emphasis added]

409. On August 18, 2011, the plaintiffs' fact witness Mr. El-Feghaly executed and filed with the City an affidavit stating:

I am the Purchaser named in the Agreement dated August 18, 2011, for the purchase of Ottawa Taxi Plate No. 318

The full and true consideration paid to the Vendor for the sale is the sum of ONE HUNDRED AND FIFTY THOUSAND (\$150,000.00) DOLLARS for all matters relating to the said sale, including the sale of Ottawa Taxi Plate No. 318.⁴⁸⁹

410. Notwithstanding the content of his affidavit, Mr. El-Feghaly gave the following evidence in examination in chief:

Q. Okay. Okay. So when you bought your plate, do you remember how much you paid for it?

A. When I buy my plate, I paid around 320, \$320,000.⁴⁹⁰

⁴⁸⁸ Yeshitla Dadi, Cross-Examination, January 23, 2023, *supra* note 26, at p. 123, line lines 4-24.

⁴⁸⁹ Exhibit 98, *supra* note 26, at p. F1145,

⁴⁹⁰ Antoine El-Feghaly, Examination in Chief, January 25, 2023, *supra* note 26, at p. 86, lines 7-11.

411. Finally, on September 11, 2013, the representative plaintiff Mr. Mail executed and filed with the City a sworn declaration stating that the Bill of Sale associated with his purchase of Ottawa Taxi Plate 525 “represents a *bona fide* transaction to the best of my knowledge and belief.” The Bill of Sale listed a purchase price of \$150,000.⁴⁹¹ However, it was Mr. Mail’s evidence that he paid approximately \$325,000 for his plate.⁴⁹² In examination in chief, he stated the following:

Q. 2013. Okay. And so what, what amount did you fill in for the transfer fee? Do you remember?

A. So the guy was putting in the, I mean the seller guy, was putting in the paper, the one was certified cheque, 150, [\$150,000] reportedly.

Q. And so why was the amount that you reported to the city different than the amount that you actually paid for the plate?

A. Because that's the way they were doing it, the seller. I couldn't have a control. Either you buy or not. Somebody else was on line, he would buy the plate.⁴⁹³

412. Mr. Mail explained the reason for the discrepancy as follows:

Q. And let's go, sir, to the answers to your, to the questions put to you on cross-examination, on July 19, 2017.

MR. BURKE: Mr. Polowin, could you put that up, please?

MR. POLOWIN: Yeah.

MR. BURKE: Question 211.

MR. BURKE: Q. Question 211,

QUESTION: So why did you sign a bill of sale that says \$150,000?

ANSWER: This is the seller was advising the charter accountant to put this price, probably because of his taxes. But on top of this, he got my lease sold at 195,000 was my lease. He sold it to the other guy, which I had mentioned before you. I couldn't hold the lease plus plate, so he agreed with me to take my lease on top of this 200,000. Why he put a 150,000? Because he was the one that advised the charter accountant to write the \$150,000. I have no objection. He was asking for cash. He did it for tax purposes, probably.

QUESTION: So what's on the bill of sale is not actually what the terms of the sale were?

ANSWER: You can see it. He doesn't report it, but this is the reality which I am saying. Now, sir, that was your answer back in 2017.

A. And my answer is the same now.

⁴⁹¹ Exhibit 72, Iskhak Mail Plate Transfer Records, pp. F442-F446.

⁴⁹² Iskhak Mail, Examination in Chief, January 18, 2023, p. 117, lines 16 – 26.

⁴⁹³ *Ibid*, p. 118, line 29 – p.119, line 7.

Q. Well, sir, your answer is a little broader now than it was then. Isn't it?

A. Little, it's not too much.⁴⁹⁴

413. The evidence further demonstrates that the practice of reporting false transfer values is widespread beyond the plaintiffs' witnesses themselves. On July 19, 2017, Mr. Mail was cross-examined on his affidavit sworn in support of the plaintiffs' motion for certification of the class proceeding. He provided the following answer to question 214 of the cross-examination:

QUESTION: How do you propose to communicate with each one of those proposed plaintiffs in the class to find out how they have had a similar case to yours in that they executed a bill of sale which indicates on its face a price different than what they've actually paid?

ANSWER: This is a basic routine that was going on for years, years, years. Nobody wants to show full price on the paper.⁴⁹⁵ [*emphasis added*]

414. When cross-examined at trial, Mr. Mail ultimately adopted the following evidence:

MR. BURKE: Q. All right. So today, you're, you're now going back and adopting your previous answer. And that is, "This is a basic routine that was going on for years and years and years. Nobody wants to show the full price on the paper." Do you adopt that today?

A. Because of the language, because of the conversation, I had probably, I misunderstand that time, some barriers happening. But I'm not, like, to know all this terminology which they was asking me. But my point is very clear. If there is no requirement, if they don't require so everybody....

THE COURT: Okay. Sir, sir, do you agree with your answer? Do you adopt that? It says, "This is a basic routine that was going on for years, years, and years?"

A. Yes. I agree with it, Your Honour.⁴⁹⁶

415. While the plaintiffs claim that proximity arises out of the City's requirement for plate transferees to report the details of their transfer, the evidence demonstrates that: (1) the City took no steps to independently verify the details; and (2) transferees routinely reported false transfer values. These types of interactions between the plaintiffs and the City are an ordinary part of the regulatory regime. They

⁴⁹⁴ Iskhak Mail, Cross-Examination, January 19, 2023, *supra* note 26, at p. 68, line 6 – p. 69, line 2.

⁴⁹⁵ Read in to Iskhak Mail, Cross-Examination, January 19, 2023, *supra* note 26, at p. 77, line 3 – 17.

⁴⁹⁶ Iskhak Mail, Cross-Examination, January 19, 2023, *supra* note 26, at p. 80, lines 14-30.

cannot credibly be considered the type of “close and direct” interactions outside the ordinary context of the regulatory regime that are required to give rise to proximity.

(4) The City plays no role in the market value of plate licenses

416. Another factor alleged to give rise to proximity is the plaintiffs’ claim that the City “actively and deliberately encouraged the growth in the market value of the Plates.”⁴⁹⁷ Aside from this bald allegation in their statement of claim, the plaintiffs did not lead any evidence of any such encouragement.

417. To the contrary, it is uncontroverted that while the City’s regulatory regime permitted the transfer of plate licenses, the City does not play any role in determining the consideration paid between the transferee and transferor of the license on the secondary market. The parties agree that:

During the period of 2012 to 2016, there were one hundred and fifty six (156) transfers of taxi plate holder licenses reported to the City. The nature and quantum of consideration was determined by plate license holder transferor and transferee, without input or oversight of the City. The monetary consideration for the transfers reported to the City varied between \$1.00 to \$320,000.00. ⁴⁹⁸ [*emphasis added*]

418. The plaintiffs’ witnesses consistently acknowledged that the value at which a plate is transferred is negotiated as between the transferee and the transferor, without any involvement by the City. In cross-examination, Mr. Way acknowledged the following:

MR. BURKE: Q. All right. And just in that vein, I suppose if one was unable to obtain a plate from the municipality, one could acquire a plate by, by means of transfer from an existing plate holder and have it transferred to himself or herself?

A. Correct.

Q. All right. And the transfer price would be the subject of negotiation between the individuals or entities involved in the transaction?

A. Yes.

Q. And if the price is agreed upon, the plate would transfer from an existing holder to a new holder, correct?

A. Correct.

Q. All right. And the price at which the plate was transferred would not involve the municipality?

A. Apart from reporting it? No.

⁴⁹⁷ Amended Amended Statement of Claim, *supra* note 2, at para. 19(f).

⁴⁹⁸ Statement of Agreed Facts, *supra* note 1, at paras. 21-22, p. F5.

Q. That's right. So to — and that's — you're absolutely right. So I should be more precise. The determination of the price had nothing to do with the municipality?

A. No.

Q. And that was the case prior to amalgamation, and that was the case after amalgamation?

A. Correct.⁴⁹⁹ [*emphasis added*]

419. Mr. Way also agreed that the City does not in any way regulate the amounts for which a plate may be transferred between licensees:

Q. All right. Thank you. And, sir, you'll agree with me that the City does not issue any regulations in terms of the amounts for which a plate might be transferred?

A. Are you — could we specify amounts to be transferred? Is that the fee from the City, or no?

Q. Not fee. Not the fee.

A. Okay.

Q. The, the, the consideration or the value...

A. Then I would — yes.

Q. ...that is exchanged between the transferor and the transferee?

A. I would agree.⁵⁰⁰

420. This evidence from Mr. Way parallels that of the other representative plaintiff, Mr. Mail, who acknowledged that, “the appraisal of the plate was depend of the demand on the market. It's not something which is set by some rule or regulation, it was how much demand was in the market.”⁵⁰¹

421. When Mr. Dadi was asked how the purchase price for his plate license was determined, Mr. Dadi gave the following evidence:

Q. All right. And how did you figure out the purchase price? So that, that was an amount negotiated between you and Mr. Bobal?

A. Yes.

Q. No one else was involved in that negotiation?

A. No.⁵⁰²

⁴⁹⁹ Marc André Way, Cross-Examination, January 10 2023, *supra* note 30, at p. 84, line 22 – p. 85, line 13.

⁵⁰⁰ *Ibid*, p.140, lines 20-31.

⁵⁰¹ Ishkak Mail, Cross-Examination, January 19, 2023, *supra* note 26, at p. 57, lines 11-14.

⁵⁰² Yeshitla Dadi, Cross-Examination, January 23, 2023, *supra* note 26, at p.129, line 30- p. 130, line 3.

422. Mr. El-Feghaly's evidence was similar, as he made it clear that the purchase price for his plate was determined as between himself and the plate vendor:

Q. But you told me you purchased the plate for 320,000?

A. Yes. But the owner, he agreed, we agreed together, that's mean, supposed to be some money cash, some money cheque, certified cheque.⁵⁰³

423. In short, it is uncontroverted that the transfer value for plates was determined between transferor and transferee, to the exclusion of the City. There is no evidence of "close and direct" interactions with respect to plate value through which the City in any way entered into "commercial relationships" with the plaintiffs or provided "advice and directions" with respect to the value of plate licenses.⁵⁰⁴

424. Nevertheless, the plaintiffs assert that proximity arises on the basis that by "permitting and facilitating" the transfer of plates on the secondary market, the City "encouraged" the growth in their value.⁵⁰⁵ Indeed, in cross-examination, Mr. Way reiterated this position, despite at the same time agreeing that there is a "difference between encourage and permit":

Q. All right. And, sir, do you agree with me that any person who buys a plate does so with considerable risk just as any business involves a degree of risk?

A. Businesses do have a degree of risk.

Q. Yes.

A. In this particular case, the City encouraged the transferability of plates. Therefore minimized the risk.

Q. You say encouraged the transfer of plates? That's what you just said?

A. Yes.

Q. All right. And, sir, I suggest to you that there's a difference between encourage and permit. Do you accept that there is a difference between those two words?

A. Yes, I do.

Q. And I suggest you, sir, that the by-law permits the transfer, but that the by-law does not encourage the transfer. Do you agree with that

A. I understand that the by-law permits transfer, but that by permitting the transfer, and simplifying transfers, it encourages the transfers.

⁵⁰³ Antoine El-Feghaly, Cross-Examination, January 25 2023, *supra* note 26, at p. 105, lines 23-27.

⁵⁰⁴ *Imperial Tobacco*, *supra* note 341, at [para. 53](#).

⁵⁰⁵ Amended Amended Statement of Claim, *supra* note 2, at para. 19(f) p. B-1-5682.

Q So as I understand it your perspective is that by simply permitting the transfer that that is equivalent to encouraging the transfer

A. Yes.⁵⁰⁶ [*emphasis added*]

425. This argument is illogical for two reasons. First, as Mr. Way himself acknowledges, there is a difference between permission and encouragement. Indeed, at a later point in his cross-examination, Mr. Way insisted on a definition of encouragement that would require an active attempt at persuasion.⁵⁰⁷ The term permission clearly does not contemplate this active element.

426. The Concise Oxford English Dictionary (12th ed.) defines the verbs encourage, facilitate and permit as follows:⁵⁰⁸

Encourage: 1. give support, confidence or hope to. 2. help or stimulate the development of. ⁵⁰⁹	Permit: 1. Give permission to (someone) or for (something); allow. 2. Make possible; 3. (permit of) <i>formal</i> allow for; admit of.
Facilitate: make easy or easier	

427. Second, it is illogical to conclude that by merely creating a regulatory regime under which plate licenses could accrue value, the City encouraged the development of that value. This is equivalent to the argument that by merely permitting the construction of houses within a given area, the City encouraged the growth in the value of those houses.

428. The evidence is clear that the City merely established a regulatory regime in which plate licenses could be transferred for consideration, subject to certain reporting and licensing requirements. Having established such a regime, the City played no further role with respect to these transfers, beyond

⁵⁰⁶ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 137, line 27 – p. 138, row 18.

⁵⁰⁷ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 89, lines 11- 31; p. 93, lines 6 – 21.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Concise Oxford Dictionary (12th ed.) (Oxford: Oxford University Press, 2011).

ensuring that the reporting and licensing requirements were met. The City had no role in determining the price at which licenses were transferred, and it took no steps to independently verify the transfer price that was reported to it (and which was frequently reported falsely).

429. As Mr. Way stated in cross-examination:

Q. All right. And so it [*the City*] has — other than documenting the transfer, receiving a transfer fee, it has no other role other than recording the price of the transfer or the value of the transfer in its records?

A. No.

Q. No, it has no other role?

A. No, it has no other role. Yes.⁵¹⁰

430. There is no evidence within this framework of any close and direct interactions outside the ordinary scope of the regulatory regime that would give rise to proximity.

(5) The Plaintiffs made no investments beyond the scope of the regulatory regime

431. The plaintiffs allege that proximity arises because the “regulatory scheme required investment by Class Members.”⁵¹¹ The plaintiff have identified no such investment beyond their compliance with the regulations set out in the 2012 By-law, pursuant to which they were permitted to exploit their plate holder and broker licenses for economic gain.

432. In cross-examination, Mr. Way confirmed that it is his view that the costs required to comply with the by-law constitute investments in the regulatory regime:

Q. All right. Now, I want to take you to one of your answers to undertakings, which I believe is found at B-1-5-1-0-9. And I believe it's question 15. All right, and I'm just going to read that to you, Mr. Way, "The undertaking was to identify provisions of the by-law, which require investments by plate owners, class members." You say:

[As Read] The following provisions of the 2012 by-law required investment by plate owners.

⁵¹⁰ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 140, line 32 – p. 141, line 7.

⁵¹¹ Amended Amended Statement of Claim, *supra* note 2, at para. 19(b) p. B-1-5681.

- The provision requiring a person who wishes to operate a taxicab service to have a current taxi plate affixed to the motor vehicle.
- The provision requiring the installation and use of a taximeter.
- The provision requiring a roof sign.
- The provision imposing various requirements for a taxi cab, including equipment to accept debit and credit card payments.
- The provisions requiring licensees to affix an identifying number on the taxicab.
- The provision requiring an accessible taxicab to remain in service 10 hours a day, 5 days a week.
- The provision of requiring an accessible taxicab to have a rear sensor.
- The provision stipulating the capabilities of an accessible taxicab to accommodate wheelchairs or scooters.
- The provision requiring the installation and use of the camera system.
- The provisions establishing various standards for taxicabs and accessible taxicabs, including maximum ages for taxicabs and replacement taxicabs.
- The provision requiring a GPS system for accessible taxicabs.
- And the various provisions requiring the payment fees by plate owners.

Now, Mr., Mr. Way, you'll agree with me that every — that the items that you have identified, those are requirements of the 2012 by-law, correct?

A. Correct.

Q. All right. And secondly, you'll agree with me that those provisions, similar provisions to these, were also found in the 2005 by-law. These types of requirements?

A. They were, yes.

Q. And I just want to understand, sir, is it these fees or these costs, is, is it your position that these are — these constitute investments into the regulatory scheme?

A. Yes.⁵¹² [*emphasis added*]

433. Mr. Way also agreed that 90% of his business costs are driven by compliance with the regulatory regime:

Q. Well, I, I, I must admit I'm a bit confused because as I — you said you're agreeing with the 90 percent and then you, then you qualify that. So I just want to understand, in terms of the cost to you, in terms of running a business, a taxicab business, is 90 percent driven by the requirements of the by-law?

A. Yes.

⁵¹² Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 39, line 17 – p. 41, line 6.

Q. All right, and as I understand it, 10 percent, the additional 10 percent of your costs, are advertising and marketing?

A. Yes.⁵¹³ [*emphasis added*]

434. Later in cross-examination, Mr. Way confirmed that the City “has nothing to do with advertising and marketing for your business,” and admitted that the plaintiffs have not identified any investments in the regulatory regime beyond the requirements of the by-law:

Q. All right. Thank you. Let me get back to my questions. So we were talking about 90 percent of the costs associated with the regulatory regime, correct?

A. Yes.

Q. And then 10 percent of your costs are marketing and advertising?

A. Yes.

Q. And you'll agree with me that the city has nothing to do with advertising and marketing for your business?

A. It does not.

Q. All right. And, sir, beyond those investments in remaining compliant with the regulatory regime, you have not identified any further investments by the plaintiffs in the regulatory regime beyond those?

A. If, if I've identified?

Q. Yes, there's not — other than complying with the regulatory regime, you've identified no other item that constitutes an investment in the regulatory regime?

A. No, no I have not.⁵¹⁴ [*emphasis added*]

435. Finally, Mr. Way agreed that City Council has never directed or encouraged him or any of the other class members to make specific investments in the regulatory regime.⁵¹⁵

436. The evidence is clear that the plaintiffs have not made any investments in the regulatory regime. The plaintiffs have simply complied with the regulatory regime, as would be expected of participants in any other regulated business. Mere compliance with a regulatory regime does not give rise to proximity sufficient to found a duty of care.

⁵¹³ *Ibid*, p. 42, lines 2-12.

⁵¹⁴ *Ibid*, p. 46, line 21 – p.47, line 7.

⁵¹⁵ *Ibid*, p. 48, lines 6-10.

(6) No “collaboration” between the plaintiffs and the City

437. The plaintiffs claim that prior to the arrival of Uber, “the City and the taxi industry partnered to enforce against bandit cabs,” that they engaged in “joint enforcement operations in the 2010s”, and that they were “close collaborators in a joint venture to enforce the by-law against unlicensed operators.”⁵¹⁶

438. These claims overstate and mischaracterize the evidence before the Court. No such partnership existed.

439. To begin with, the plaintiffs once again take a narrow view of the City’s responsibilities with respect to enforcement of the taxicab regime. Their framing of the evidence relies on the premise that the City’ primary goal in enforcement of its taxi by-law is to protect the economic returns of plate holders by enforcing against unlicensed competitors. In reality, and as outlined above, the City enacted and enforced its taxicab regulatory regime for the broad purposes of consumer protection and public safety. Enforcement against unlicensed bandit cabs was simply one element of the City’s broader enforcement activities, and occurred because the City saw bandit cabs as an unacceptable threat to public safety and consumer protection.⁵¹⁷

440. The plaintiffs’ submissions give the impression that the sole or primary taxi-related concern of the City prior to the arrival of Uber was the issue of competition from unlicensed bandit cabs. This characterization is not reflective of the evidence.

441. Rather, an examination of the broader taxi-related enforcement responsibilities of BLRS provides critical context for evaluating the relative importance of the City’s enforcement activities against bandit cabs.

442. The records of service requests (“**SRs**”) received by BLRS demonstrate that enforcement related to bandit cabs in fact comprises a small proportion of the BLRS’ taxi-related enforcement activities.

⁵¹⁶ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at p. 74, heading “a,” para. 227, and para. 237.

⁵¹⁷ Exhibit 194, *supra* note 426, at p. F472.

When any member of the public, including a plate holder, makes a complaint related to the taxi by-law (or indeed any by-law enforced by BLRS), that complaint is ultimately translated into a “SR”, and is logged in BLRS’s internal record-keeping MAP system.⁵¹⁸ BLRS’ annual records of SRs are categorized by enforcement category, and further sub-categorized into various categories of complaint. By way of example, the records of all SRs received by BLRS in 2010 under the “taxi” category state:

Accessible Taxi Refused Fare	44
Adverse Conduct – Driving	104
Adverse Conduct – Other	101
Adverse Conduct – Parking	8
Adverse Conduct – Physical	11
Adverse Conduct – Verbal	74
Bandit/Unlicensed	35
Customer Complaint	96
Fare/Route Complaint	138
Info-Taxis	47
Missing/Lost Article	11
No Summary	21
Proactive - Not CC Use	11
Smoking	11
Taxi Stands	11
Unlicensed Taxi	7
Unlicensed/Inspection	52
Vehicle Deficiency/Cleanliness	19
<u>Subtotal – Taxi:</u>	<u>831</u> ⁵¹⁹

443. Of these SRs, the majority stem from categories identifying complaints by taxi customers – including Accessible Taxi Refused Fare; the five “Adverse Conduct” categories; “Customer Complaint”; “Fare/ Route Complaint”; and “Smoking”.⁵²⁰ The “Unlicensed Taxi” and “Unlicensed/Inspection Categories” generally refer to taxis that had been licensed in accordance with the by-law and failed to renew their license, rather than to “bandit” cabs as commonly understood (ie. taxicabs that were never licensed and had no intention to become licenced).⁵²¹

⁵¹⁸ *Ibid*, p. 87, lines 10-20; Tania McCumber, Examination in Chief, February 7, 2023, p. 38, lines 28-32.

⁵¹⁹ Exhibit 1, Tab 122, 2010 By-law Statistics, pp. F7850-F7851.

⁵²⁰ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 141 line 17 –p.142, line 8.

⁵²¹ *Ibid*, p. 143, lines 8 – 13.

444. The only categories relating to bandit cabs are “Bandit/Unlicensed” and “Proactive – Not CC [Call Centre] Use.” In 2010, BLRS had a total of 44 SRs relating to bandit cabs, out of a total of 831 SRs under the taxi category. Put differently, just 5.2% of all taxi-related SRs stemmed from bandit cabs.

445. This proportion pales in comparison to even those SRs relating to taxis that had failed to properly renew their licenses, which totaled 89, or 10.7% of all taxi-related SRs. However, the overwhelming majority of SRs derived from the customer-initiated categories of Accessible Taxi Refused Fare, the five “Adverse Conduct” categories, “Customer Complaint”; “Fare/Route Complaint”; and “Smoking.” The SRs in these categories totaled at least 587, or 70.6% of all taxi-related SRs in 2010.⁵²² Given that customer complaints may be included in other categories as well, this is likely to be an underestimate.

The relative proportions of the different categories of SRs did not meaningfully change between 2010 and 2014, the period in which the plaintiffs allege that “the City and the taxi industry intensified their collaboration.”⁵²³

	2010 ⁵²⁴	2011 ⁵²⁵	2012 ⁵²⁶	2013 ⁵²⁷	2014 ⁵²⁸
Customer-initiated SRs ⁵²⁹	Total: 587 70.6% of all taxi SRS	Total: 719 81.1% of all taxi SRS	Total: 545 81.7% of all taxi SRS	Total: 651 76.5% of all taxi SRS	Total: 664 71.6% of all taxi SRS
SRs related to formerly licensed taxicabs ⁵³⁰	Total: 89 10.7% of all taxi related SRs	Total: 50 5.6% of all taxi SRs	Total: 60 9% of all taxi related SRs	Total: 74 8.7% of all taxi related SRs	Total: 47 5.1% of all taxi related SRs

⁵²² Exhibit 1, Tab 122, *supra* note 519, at pp. F7850-F7851.8.

⁵²³ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at p. 78, heading “b.”

⁵²⁴ Exhibit 1, Tab 122, *supra* note 519, at pp. F7850-F7851.

⁵²⁵ Exhibit 1, Tab 123, 2011 By-law Statistics, pp. F7858-F7859

⁵²⁶ Exhibit 1, Tab 124, 2012 By-law Statistics, pp. F7867.

⁵²⁷ Exhibit 1, Tab 125, 2013 By-law Statistics, pp. F7876.

⁵²⁸ Exhibit 1, Tab 126, 2014 By-law Statistics, pp. F7885.

⁵²⁹ Sum of the categories entitled “Accessible Taxi Refused Fare”, the five “Adverse Conduct” categories, “Customer Complaint”, “Fare/ Route Complaint”, and “Smoking.”

⁵³⁰ Sum of the categories entitled “Unlicensed Taxi” and “Unlicensed/ Inspection Categories”

SRs related to bandit cabs⁵³¹	Total: 44 5.2% of all taxis related SRs	Total: 18 2% of all taxi SRs	Total: 42 6.3% of all taxis related SRs	Total: 88 9.9% of all taxis related SRs	Total: 78 8.4% of all taxis related SRs
Total SRs – taxi category	831	887	697	851	928

446. These figures illustrate three important points.

447. First, they reinforce the evidence outlined above that the City enforces its taxi regulatory regime for the purposes of consumer protection and public safety. The overwhelming majority of taxi-related SRs received by BLRS on an annual basis involve enforcement directly relating to these purposes.

448. Second, they illustrate the degree to which the plaintiffs mischaracterize the centrality of enforcement against bandit cabs, in the context of the City’s taxi-related enforcement efforts writ large prior to the arrival of Uber. If enforcement against bandit cabs was as high on the City’s enforcement priority list as the plaintiffs would have this Court believe, it would be logical to expect that enforcement against bandit cabs would comprise a greater proportion of taxi related SRs.

449. By way of contrast, in 2015, after Uber began operating in Ottawa, and when the City was devoting increased resources to enforcement against unlicensed taxicabs, SRs under the “Bandit/Unlicensed” and “Proactive – Not CC Use” totaled 263, representing 25.3% of the 1,036 taxi-related SRs for 2015 (a 301% increase over the proportion of these SRs in 2014).⁵³²

450. The plaintiffs’ mischaracterization of the centrality of enforcement against Uber prior to the arrival of bandit cabs informs their entire analysis on this issue. By way of example, the plaintiffs claim that: “Shortly after amalgamation, the City dedicated two by-law officers to the enforcement of the taxicab by-

⁵³¹ Sum of the categories entitled “Bandit/ Unlicensed” and “Proactive - Not CC Use.

⁵³² Exhibit 1, Tab 127, 2015 By-law By-law Statistics, p. F7894.

laws. This commitment was done in part because of the increase in bandit taxi services.”⁵³³ Although this claim cites the examination in chief of Ms. Hartig,⁵³⁴ it does not align with her evidence. Ms. Hartig did not identify enforcement against bandit cabs as part of the rationale for hiring two dedicated officers:

Q. And during the time period that the 2012 by-law was enforced, do you recall if there were by-law officers that were, specifically, dedicated to the taxi industry?

A. At that time my recollection's we had two officers who were focused on taxi related issues, so they were considered our, sort of, subject matter experts. And because they do work shift and we do receive complainants outside of — like anytime of day or night often, we would — there would be other officers who might be available to step in to take, you know, made the initial information and so on, as necessary.⁵³⁵

451. Rather, as Ms. Hartig explained, (just before the part of her testimony mischaracterized by the plaintiffs), and as the SRs reflect, the majority of BLRS enforcement activities with respect to the 2012 By-law involved complaints by members of the public, and specifically by taxicab customers:

Q. All right. And this morning you outlined some of the responsibilities that the BRS, which is by-law and regulatory services, as in relation to the 2012 by-law. I want to ask you some questions, sort of, like a little more practical questions. And that is, what is a complaint under the by-law?

A. So, generally speaking a complaint, we refer to them as SRs, are typically generated by members of the public and in the case of taxi cab service largely passengers. And they might have a concern about any number of things that we would regulate, you know, driver conduct and so on and so forth.⁵³⁶

452. Further, the City's specific assignment of two enforcement officers was not unique to the taxi licensing category. As former BLRS Enforcement Officer and Supervisor Chris Powers explained, BLRS had various separate dedicated units, including a unit specifically dedicated to business licensing and premises inspection, and another specifically dedicated to traffic enforcement.⁵³⁷

453. The plaintiffs' characterization of the Taxi Stakeholder Group is a further example of their misunderstanding of the relative centrality of enforcement against bandit cabs. The plaintiffs state that:

⁵³³ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 216.

⁵³⁴ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 216, note 320.

⁵³⁵ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 89, line 24 – p. 90, line 1

⁵³⁶ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 87, lines 10-20.

⁵³⁷ Christopher Powers, Examination in Chief, February 13, 2023, p. 29, lines 5-12.

After the City dedicated two by-law officers to taxi licensing enforcement, it had established the Taxi Stakeholders Working Group. Through regular meetings, industry representatives would regularly discuss the issue of bandit cabs with the City.⁵³⁸

454. This framing naturally leads to the impression that the Taxi Stakeholders Group was formed solely to address the issue of bandit cabs. Again, the evidence demonstrates that this was not the case. As Ms. Jones explained in cross-examination, the Taxi Stakeholders Consultation Group was formed to provide a venue for communication and feedback on a range of issues, both between the City as regulator and the taxi industry, and for different stakeholders within the industry, and specifically to further the goals of consumer protection and public safety:

Q. ...this leads me, this, this is, this is – thank you very much for that because this leads me into my next question which was there was a taxi advisory committee and after that there, as you mentioned yesterday, that was replaced by the taxi stakeholders' group?

A. Consultation group, yes.

Q. Consultation group...

A. Yes.

Q. ...and I think you've alluded to this but this, the, these, these taxi advisory committees and the taxi stakeholders' groups were formed to assist you and the regulator in enforcing the taxi by-law, would that be fair?

A. I....

Q. Or at least to provide support for your enforcement activities?

A. The, it, it provided an opportunity for two-way communication to assess what the issues were and to continue to get feedback as we were looking at introducing new regulations.

Q. Okay. So in that, again be, because of the functions of those two, the, that, that group, but whether you want to call it the advisory committee or the stakeholders' group - I think the stakeholders' group you mentioned yesterday was, was much more focussed on industry concerns or, or it, it had industry stakeholders, is that right or, or....

A. Yes, the, the early years of taxi advisory committee it recognizing, coming over from -- the former Ottawa taxi advisory committee then was entirely made up from public...

Q. Yes.

A. ...carrying into the new amalgamated city, recognizing the importance of having taxi industry representatives as part of that group, so the public and taxi industry came together as it evolved, that taxi holder -- stakeholder consultation group really became more an informal, non-formalized way, committees were run, a venue by which the regulators would meet frequently with the industry to discuss common issues.

...

Q. Okay. So, but the, but again the idea, if, if I understand your evidence correctly, of having a taxi stakeholders' group was to get more focussed interaction with the, with, with

⁵³⁸ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 92

various constituents in the taxi industry for more effective regulation of the public interest, is that fair?

A. It was certainly -- both ways...

Q. Okay.

A. ...the industry themselves unionized, are you a placeholder or are you not - very complex from their end of things and so they all needed to be able to work with each other to ensure both sides were being heard, and there were various sides, but this seemed to be an effective way to do it.

Q. And I believe you mentioned yesterday that, that actually in your experience both you, from your side as the regulator and from the taxi industry's side there was generally you were generally focussed on trying to achieve the same objectives, safety, consumer protective...

A. Promote accessibility...

Q. ...accessibility and all those things...

A. ...[*indiscernible*]...

Q. ...you, you actually all....

A. ...public safety, consumer protection, I think we were all in agreement.⁵³⁹ [*emphasis added*]

455. Ms. Jones' fulsome explanation of the role of the Taxi Stakeholders Consultation Group is yet another of example of the incongruity between the plaintiffs' framing of the evidence⁵³⁹ and the reality of the City's behaviour as regulator. Although the City formed the group to facilitate discussion with and within the taxi industry, and to further the overarching regulatory goals of consumer protection and public safety, it is framed by the plaintiffs exclusively through the lens of enforcement against bandit cabs.

456. Third and finally, the SR figures for 2010 to 2014 undermine and contextualize the plaintiffs' claims that they established a "partnership of mutual reliance and responsibility" with respect to enforcement of the taxi by-law.⁵⁴⁰

457. To begin with, the plaintiffs' ability to make complaints to the BLRS regarding bandit cabs was not unique. Any person is entitled to make a complaint to the City regarding any potential by-law violation, including relating to the operation of an unlicensed taxicab. The mere fact that plate license

⁵³⁹ Susan Jones, Cross-Examination, February 9, 2023, *supra* note 401, at p. 45, line 3 – p. 46, line 6; p. 46, line 27 – p. 47, line 16.

⁵⁴⁰ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 224.

holders availed themselves of this opportunity does not create a relationship outside of the regulatory framework. In complaining to BLRS about unlicensed competitors, the plaintiffs were no different from any informant in any other regulated business. For that matter, they were no different from members of the public complaining to BLRS about potential by-law violations by plate license holders.

458. Further, it bears repeating that between 2010 and 2014, the supposed height of collaboration between the plaintiffs and the City, SRs related to bandit cabs comprised between 2 and 9.9% of all taxi-related SRs received by BLRS in any given year. Cooperation with respect to such a proportionately minor aspect of BLRS enforcement activities can hardly be considered the type of partnership suggested by the plaintiffs.

459. Finally, the plaintiffs have not actually established that SRs related to bandit cabs stemmed from their complaints. They have certainly not led any evidence of specific, widespread instances of collaboration between plate license holders and BLRS.

460. The plaintiffs identify two specific instances in which Mr. Way directly communicated with BLRS leading to enforcement against bandit cabs, with one instance each occurring in 2013 and 2014.⁵⁴¹ The plaintiffs also identify another single instance of Mr. Way requesting to collaborate with respect to enforcement against a “seemingly unlicensed limousine company,” again in 2014.⁵⁴²

461. The plaintiffs have established, at most, that Mr. Way was the source of a complaint leading to one instance of enforcement against bandit cabs in 2013, in comparison to the 44 SRs received by BLRS that year relating to bandit cabs. In 2014, Mr. Way was the source for complaints leading to two instances of enforcement, in comparison to the 18 SRs received by BLRS that year relating to bandit cabs. These interactions cannot credibly be considered any kind of “partnership.”

⁵⁴¹ *Ibid*, para. 226.

⁵⁴² *Ibid*, para. 227.

462. Indeed, when the taxi industry did offer to enter into a more formal partnership with BLRS by funding a group of enforcement officers that would be dedicated to the taxi industry, that offer was rejected.⁵⁴³

(7) The plaintiffs have not identified any specific representations

463. Although the plaintiffs do not plead negligent misrepresentation, they claim that “generations of plate owners invested in the industry on the common assumption, based on representations by municipal regulators, that their capital investment would be safe.”⁵⁴⁴ However, they have not identified any specific representations or advice from any City official, either advising the plaintiffs to invest in a plate license, or undertaking a specific course of conduct from the City.

464. When asked about specific advice or representations from the City regarding investment in the regulatory regime, Mr. Way gave the following evidence:

Q. All right. And, sir, you also gave an undertaking to identify occasions on which mayors or councillors have told you or other plate holders of the need to re-invest in your industry?

A. Yes.

Q. And you identified in question 17 of the answers to undertakings, you said:

[As Read] Marc André Way recalls meeting with had Hanif Patni and the mayor of Ottawa on or around April 12, 2016, where the mayor expressed frustration with the taxi industry's level of investment in their industry. Mr. Way recalled similar discussions with counselors prior to that time, but cannot recall the specific time and place of those discussions.

And you'll agree with me, sir, that the mayor was expressing a, a view that you should be investing in the — your industry, not investing in the regulatory regime?

A. The, the context of the conversation was the difference between our app and the Uber app. And the mayor's comment was that we needed to accelerate the technology that we were the, the, the — accelerate the potential improvement to the app that we were already using.

Q. Right. Okay. And that would be an investment in your own business?

A. It's part of the dispatch engine, yes.

Q. Right. Now, you'll also agree with me that City Counsel [*sp.*] has never directed or encouraged you or any of the other class members to make specific investments in the regulatory regime?

⁵⁴³ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 48, lines 11-20.

⁵⁴⁴ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 7.

A. No.⁵⁴⁵

465. Indeed, none of the plaintiffs' witnesses identified any specific representations or advice from the City on which they relied.

466. This absence of specific evidence, and the plaintiffs' absence of specific allegations, is all the more striking because the plaintiffs do not hesitate to identify specific advice and reliance when the evidence supports it. In particular, the plaintiffs reference specific representations made by friends and colleagues of the various fact witnesses, and point to these referneces as having induced the fact witnesses to invest in the taxi industry. Examples include the following statements in the plaintiffs' Closing Submissions:

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"

...

"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."

...

"Mr. Mezher wanted a career with a more flexible schedule so that he could spend time with his family. He spoke to his friends in the taxi industry and understood that it gave more freedom in setting one's schedule." [*emphasis added*]

467. In light of the relative specificity regarding representations made by the fact witnesses friends and colleagues, the plaintiffs' lack of any detail regarding specific representations allegedly made by the City is striking, and is further evidence of a lack of proximity.

⁵⁴⁵ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 47, line 7 – p. 48, line 10.

(8) “Public Representations” – the plaintiffs were aware at all material times that the municipality retained ownership of taxi plates

468. The plaintiffs further argue that various sporadic public statements made by City officials over the years regarding the taxi industry, Uber and bandit cabs are part of the proximity factual matrix.”⁵⁴⁶ These statements must be understood in the context of other public representations made by the City and its predecessors.

469. To begin with, as discussed above, the taxi by-laws of the City the Predecessor Cities, at all material times, retained ownership of taxi plates with the issuing municipality. Mr. Way admitted that he was familiar with most of these by-laws.

470. Specifically, on cross-examination, Mr. Way admitted that he and Metro were familiar with the following by-laws and provisions, all of which provided for the issuing municipality to retain ownership of taxi plates, at all material times:

- (a) Mr. Way held plates in the City of Gloucester, and was familiar with Gloucester’s Taxi By-law 1 of 1984, including with sections 39(1) and (2), which retained ownership of all taxi plates with the City;⁵⁴⁷
- (b) Mr. Way was familiar with Gloucester By-law 41 of 1998, the final taxi by-law enacted before amalgamation, and with section 13(3) of that by-law, which retained ownership of all taxi plates with the City;⁵⁴⁸
- (c) The City of Vanier was the focal point of Metro Taxi’s business activities prior to amalgamation, and Metro held plate licenses there.⁵⁴⁹ Section 25(1) of Vanier’s Taxi By-law 33 of 1994 retained ownership of taxi plates with the municipality. Section 25(1) of By-law 34-00, enacted in 2000 (just before amalgamation), contained identical language.

⁵⁴⁶ *Ibid*, para. 219.

⁵⁴⁷ Marc André Way, Cross-Examination, January 10 2023, *supra* note 30, at p. 74, line 29 – p. 75, line 4

⁵⁴⁸ *Ibid*, at p. 75, lines 5-33.

⁵⁴⁹ *Ibid*, at p. 76, lines 1-9.

Mr. Way was familiar with both Vanier by-laws in general, and with section 25(1) of both by-laws specifically.⁵⁵⁰

- (d) Mr. Way was familiar with section 32(f) of the City of Kanata's Taxicab By-law 3 – 82, enacted in 1982, which provided that taxi plates remained the property of the municipality at all times;⁵⁵¹
- (e) Mr. Way was familiar with section 21(1) of the City of Kanata's by-law 120-97, which contained similar language;⁵⁵²
- (f) Mr. Way was familiar with section 21(1) of the City of Nepean's taxicab by-law 115 of 2000, which provided that all licenses were the sole and exclusive property of the municipality;⁵⁵³
- (g) Metro held approximately 50 taxi plates in the City of Ottawa prior to amalgamation. Mr. Way would have been familiar with both By-law L1, enacted in 1969, and with By-law L6, enacted in 2000, both of which included provisions retaining ownership of plates with the Former City; and⁵⁵⁴
- (h) Finally, Mr. Way is of course familiar with the 2005, 2012 and 2016 By-laws, all of which contain provisions retaining ownership of all taxi plates by the City.⁵⁵⁵

471. In examination in chief, Mr. Way took the position that these types of provisions were only effective if the plate holder was not in good standing. However, in cross-examination he conceded that these provisions contain no such limitation or qualification:

⁵⁵⁰ *Ibid*, at p. 76, line 10 – p.77, line 19.

⁵⁵¹ *Ibid*, at p. 78, line 10 – p.79, line 24.

⁵⁵² *Ibid*.

⁵⁵³ *Ibid*, at p. 81, lines 7-27.

⁵⁵⁴ *Ibid*, at p. 81, line 27 – p. 83, line 24.

⁵⁵⁵ *Ibid*, at p. 107, line 10 – p. 110, line 3.

Q. Now, sir, your evidence given last week, as I understood, was that you interpreted these types of provisions as only being effective when a plate owner was not in good standing. That was your evidence?

A. Correct.

Q. And, sir, you'll agree with me on the basis of your familiarity with these provisions, and the language that is used, that there is no qualification in the language in that regard?

A. Explain qualification.

Q. None of these provisions, sir, speak about good standing?

A. No, you're correct.

Q. And none of them say that these will only be taken back in the event that one is not in good standing?

A. You're correct.⁵⁵⁶

472. If the “public representations” of the City are to be considered part of the factual matrix underpinning proximity, then the text of the taxi by-laws themselves must form the very core of those public representations. The plaintiffs, through Mr. Way, have been aware since long before amalgamation that taxi plates remain the property of the issuing municipality at all times.

(9) “Public representations” – Public reports consistently stated that municipalities ownership of taxi plates and is under no obligation to compensate plate holders

473. In addition to the plain language contained in the relevant taxicab by-laws, various public reports published over the years by authorities involved in the study and/or regulation of the taxicab industry have consistently affirmed that the issuing municipality retains ownership of taxi plates at all times, and is under no obligation to compensate plate holders for regulatory changes.

474. In April 1988, the Licensing Committee of the RMOC delivered a Phase 1 Report regarding taxis and limousines to Regional Council. The report described its purpose as follows:

The purpose of this report is to place before counsel [*sp.*] the policy recommendations of the Licensing Committee concerning the licensing and regulation of taxis and limousines in Ottawa Carleton.⁵⁵⁷

⁵⁵⁶ *Ibid*, at p. 83, line 25 – p. 84, line 27.

⁵⁵⁷ Exhibit 30, April 1988 Phase 1 Report, p. F1226.

475. More specifically, the report recommended the adoption of a new regulatory model for the taxi industry in the RMOC, whose key features would include: (1), the RMOC taking over jurisdiction of the taxi industry from its constituent municipalities (which included the Predecessor Cities); (2) the abolishment of municipal boundaries and other geographic service restrictions; (3) the elimination of street value for plate licenses; and (4) a prohibition on plate transfers and leases going forward, to ensure that street value did not reoccur.⁵⁵⁸

476. Mr. Way understood that this was the purpose of the report,⁵⁵⁹ and in fact described his familiarity with the report as follows:

Q. And if we turn — and, sir, I take it, you were familiar with this particular report?

A. I'm familiar with the report.

Q. You read it at the time that it was published?

A. Shortly after?

Q. Shortly thereafter? It was a, it was a policy report that was potentially going to impact upon the industry in which you participate?

A. Correct. Yes.⁵⁶⁰

477. Section 10 of the Report, entitled Legal Review, states:

Put very briefly, the main legal points affecting this issue are as follows:

1. Basic jurisdiction found in the Municipal Act, whether exercised by Council or a Board of Commissioners of Police (Vanier and Gloucester).

2. This jurisdiction enables municipalities to restrict the right to pick up fares to cabs licenced by that municipality.

3. The only exception to this is the provision that airport cabs - with Transport Canada plates - can pick up an airport bound passenger anywhere in the Region, regardless of municipal licencing. (Temporary legislation to control this in Ottawa is under consideration at Queens Park).

4. No municipal license is legally entitled to attract a value. To the extent that there is a value, it is the property of the municipality.

5. No municipality is legally obligated to create a street value in such licences, nor is it under a duty to preserve/protect any such street value. Persons who trade in such commodities do so at their own risk.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 124, lines 22-24.

⁵⁶⁰ *Ibid* p. 124, lines 3-12.

6. If a municipality changes its regulatory system, as a result of which the value in a license is destroyed, the municipality is under no obligation to provide compensation.

7. The RMOC Act contains no provisions to authorize the Regional Municipality to license/regulate the taxi industry. For it to do so, Provincial enabling legislation, by amendment to the RMOC Act, will be required.⁵⁶¹ [*emphasis added*]

478. Mr. Way confirmed that he read this section of the report, and that he in fact agreed with item 5, to the extent that “persons who trade in such commodities do so at their own risk.”⁵⁶²

479. Section 22 of the 1988 Report stated in part:

Plate Value is the artificial price tag that has attached to taxi plates in private transfers. These plates are, in law, the exclusive property of the issuing municipality. Both internal and outside legal opinions confirm that this arbitrary value is not the responsibility of the licencing body. Plate value is a matter of private speculation between a buyer and a seller.⁵⁶³ [*emphasis added*]

480. Again, Mr. Way confirmed that he was familiar with this section of the report, and stated the following:

Q. All right. Now, sir, I take it, you would have also read section 22 of the report, is that correct? Let me just go to that. That's at F-1-2-3-5. And I'm just going to read this section, paragraph 1.

[As Read] Plate values is the artificial price tag that has attached to taxi plates in private transfers.

Do you agree with that sentence, sir?

A. What — it would depend what, what, what would private mean?

Q. Well, these are — I think you told me that these were transfers between a transferor and a transferee.

A. Okay.

Q. That's what is meant by a private transfer.

A. Then I agree.

Q. All right. And if we look at the last sentence of that particular paragraph, it says: "Plate value is a matter of private speculation between a buyer and a seller." And I take it you agree with that as well?

A. I would agree with that.⁵⁶⁴ [*emphasis added*]

⁵⁶¹ Exhibit 33, Phase 1 Report of the RMOC Licensing Committee, April 1988, s. 10, p. F1229.

⁵⁶² Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 126, lines 7-14.

⁵⁶³ Exhibit 33, *supra* note 561, at s. 22, p. F1235.

⁵⁶⁴ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 128, lines 9-30.

481. Although the 1988 Report contemplated establishing a compensation fund for plate license holders, such a fund: (1) was to be funded by the taxicab industry; (2) required enabling legislation to enact; and (3) was justified on the basis that:

that the artificial "street value" for taxi plates is not in the public interest and should be eliminated;

that a system of compensation to existing plate owners should be established by the new Commission on a basis that the same street value situation will not re-occur;

...

The non-legal system of buying, selling and leasing plates (in which, 'technically, any ownership interest is that of the municipality), must be ended. It merely increases the cost of taxi service and restricts entry into the industry for no corresponding public benefit.⁵⁶⁵

482. After receiving the April 1988 Phase 1 Report, the Regional Council of the RMOC directed the Licensing Committee to conduct further study and consultation. The Licensing Committee returned with its Final Report in June 1989, which maintained the core recommendations of: (1) the RMOC taking over jurisdiction of the taxi industry from its constituent municipalities (which included the Predecessor Cities); (2) the abolishment of municipal boundaries and other geographic service restrictions; (3) the elimination of street value for plate licenses; and (4) a prohibition on plate transfers and leases going forward, to ensure that street value did not reoccur.⁵⁶⁶

483. The Legal Review section of the 1989 Final Report reiterated the legal conclusions of the Phase 1 Report, stating, in part:

Municipalities issuing taxi licences continue to hold the property interest in the issued licences. The municipalities may limit the number of taxi licences, which they issue and this may in effect create a street value in the licences if they may be transferred privately. However, municipalities are under no obligation to permit private transfer of licences. Moreover, municipalities are not required to take the street value into consideration when making regulatory changes. The municipalities need not compensate license holders if street volume is reduced or eliminated by virtue of regulatory action. Municipalities may also reduce the number of taxi licences, which they issue, by renewing a smaller number of licences than were issued in a previous year.⁵⁶⁷ [*emphasis added*]

⁵⁶⁵ Exhibit 33, *supra* note 561, at ss. 3, 9 and 22, pp. F1226, F1228 and F1236.

⁵⁶⁶ Exhibit 30, *supra* note 557, at p. F8398-9.

⁵⁶⁷ Exhibit 30, *supra* note 557, at s. 22, p. F8433.

484. Once again, Mr. Way was familiar with and had read the 1989 Final Report in general, and this section specifically. He was also aware that “one potential option or outcome” at the time was that the “municipality could have eliminated plates altogether.”⁵⁶⁸

485. The development process for the Licensing Committee’s Final Report involved extensive public consultations. Various stakeholders in the taxi industry including plate holders, lessees and drivers, the taxi union and taxi brokers were involved in the formal consultative process along with members of the public. The consultation process involved extensive meetings with designated consultation panels, as well as public meetings and extensive submissions from members of the taxi industry and the public.⁵⁶⁹

486. The next report to consider large-scale changes to the structure of the taxi industry in the RMOC was the December 5, 2000 Taxi Project Team Report to the Ottawa Transition Board, commissioned in the lead up to amalgamation. The Taxi Project Team Report summarized the scope and outcome of the 1989 Report as follows:

In 1989, the most substantive effort of regionalization of the taxicab industry was attempted. The regional municipality of Ottawa Carleton prepared an exhaustive report detailing the industry and containing a number of significant recommendations, including the creation of an Independent Regional Licensing Commission reporting to Regional Counsel [*sp.*], development of a regional taxicab by-law, creation of two interim zones, creation of a compensation fund to reduce the street value of the plates, so that the region could eventually move to one zone and development of a uniform education program for new drivers.⁵⁷⁰

487. Mr. Way agreed that this summary of the 1989 Report is accurate.⁵⁷¹

488. Mr. Way also agreed with the Taxi Project Team Report’s description of events following the 1989 Report:⁵⁷²

It must be noted there was no legal requirement for the regional municipality to provide compensation. The report advocated the establishment of a compensation fund only because it was determined to be the most expeditious way to ensure support of the changes from the industry. The report required enabling legislation from the province to

⁵⁶⁸ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 130, line 6 – p. 133, line 18.

⁵⁶⁹ Exhibit 30, *supra* note 557, at pp. F8526-F8528.

⁵⁷⁰ Exhibit 34, *supra* note 98, at p. F2145.

⁵⁷¹ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 136, lines 7-11.

⁵⁷² *Ibid*, p. 136, line 31 – p. 137, line 3.

accomplish its objectives. However, the proposal to buy out the street value of plates was not accepted by the provincial government. Unfortunately, the sweeping reform of the industry that had been envisioned by regional government did not occur.⁵⁷³

489. The Taxi Project Team Report addressed the issue of plate values as follows:

Contrary to industry practice, taxi licenses (plates) belong to the individual municipality. Although commonly considered to have an investment value, that value is artificial or speculative and has been created because of the finite limit on the number of plates issued. The plates do not have an 'asset' value - any person who "buys" a plate does so with considerable risk just as any business involves a degree of risk.

The holder of the taxi 'plate' has been able to convince a prospective 'buyer' that the plate is a valuable asset. The prospective 'buyer' has ignored the fact that the holder of a taxi plate is not the owner. The person leasing a plate is in the same situation vis-a-vis the holder of a taxi 'plate'. That person is paying valuable rent for a commodity not owned by the holder of that taxi plate.⁵⁷⁴

490. Mr. Way read the Taxi Project Team Report, including these paragraphs, and agreed that the purchase of a plate involves risk just as any business involves risk.⁵⁷⁵

491. In drafting its report, the Taxi Project Team held a series of public consultations, as well as specific meetings to solicit the views of taxi industry members. The Taxi Project Team also "heard from other stakeholders including Algonquin College, the Ottawa-Carleton Limousine Association, the Ottawa Tourism & Convention Authority, Para Transpo and a representative of the City of Ottawa's Disability Issues Advisory Committee."⁵⁷⁶

492. KPMG's 2001 Report, commissioned post-amalgamation to review the recommendations of the Taxi Project Team Report, once again reiterated that the municipality retains ownership of plate licenses at all times:

Taxi Owner License Holders are the holders or "owners" of taxi owner licenses (commonly referred to as "plates") issued by the municipalities. Every taxi cab must have a plate affixed, and limits on the number of plates issued has resulted in the plates having a "market value" when transferred or "sold". Legally the plates remain the property of the municipality, so plate "holder" is the correct term, and plates are "transferred", not sold.

⁵⁷³ Exhibit 34, *supra* note 98, at p. F2148.

⁵⁷⁴ *Ibid*, p. F2143.

⁵⁷⁵ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, at p. 137, lines 27-30.

⁵⁷⁶ Exhibit 34, *supra* note 98, at pp. F2151-F2152.

however the area municipalities have recognized the transfer of plates between individuals in a number of ways.⁵⁷⁷ [*emphasis added*]

493. These public representations from public authorities involved in the regulation of the taxicab industry undermine the plaintiffs' argument that they relied on representations by regulators that their investment would be safe. To the contrary, Mr. Way admitted that he was aware of a series of reports that: (1) recommended the elimination of the "street value" of plate licenses (which would have included licenses held by Mr. Way); and (2) concluded that the issuing municipalities were under no obligation to compensate plate holders for the elimination of such value.

494. Contrary to the plaintiffs' characterization, the evidence demonstrates that the plaintiffs knew, or ought to have known, that they were making speculative and potentially precarious investments based on a regulatory framework whose fundamental structure was subject to change.

(10) The plaintiffs understood that they were making speculative investments

495. Mr. Way admitted that he understands taxi plate licenses to be a speculative investment. On cross-examination, he stated the following:

Q. All right. Now I want to take you to F-2-5-1-6, please. Sir, I think that you are familiar with in term "speculation"?

A. Yes.

Q. And do you agree that it means an investment in a stock property or other venture in the hope of gain but with the risk of loss?

A. Like a taxi plate.

Q. But you agree with that definition of speculation, sir?

A. I would.

Q. Yes. And I take it you would agree that the taxi plate has been the subject of speculation?

A. Yes.⁵⁷⁸ [*emphasis added*]

⁵⁷⁷ Exhibit 7, *supra* note 127, at p. F2250.

⁵⁷⁸ Marc André Way, Cross-Examination, January 10, 2023, *supra* note 30, atp. 121, lines 19-21.

496. Mr. Way also agreed that government has not specifically acknowledged or guaranteed the returns of those who invest in taxi plate licenses:

Q. All right. And, sir, if we look at the fifth paragraph, it says:

A precise estimate of the speculative portion of plate values is not possible. However, taxi plates may be compared to another form of government regulation. Agricultural quotas, although the nature of the industries are very different, the quota and the taxi plate are both pieces of, pieces of paper, guaranteeing a market share. The annual rate of return on agricultural quotas can exceed 20 percent of the quota value. This rate of return is indicative of the riskiness of holding an asset whose returns are dependent on government regulation and where government has not specifically acknowledged or guaranteed those returns. The parallel with taxi regulation is close.

And do you agree with that, sir?

A. I would agree with that. I do.⁵⁷⁹ [*emphasis added*]

497. Mr. Way provided an example of this speculation in practice, describing the phenomenon of investors purchasing plate licenses from the smaller Predecessor Cities, in the hopes that the plates would increase in value upon amalgamation:

A. Well, the reason that this was being discussed was the, the fact of the matter is that in, for example, Vanier plates at 120 to 128 plates, there was some speculation on our part that if ever the region was to merge, we would have a windfall of, of plates and access to a completely larger market without having to purchase plates. The cities of Cumberland had started to issue plates. The City of Gloucester had started to issue plates, Kanata, and, and those plates were not worth anywhere close to what an Ottawa plate was worth. So some individuals were buying those plates simply to, with, with the expectation that when they, or hopefully soon, the, the boundaries would start to be removed. So there was there was a, there was a, a speculation play there, for sure.⁵⁸⁰ [*emphasis added*]

498. Similarly, Mr. Dadi acknowledged that the price of a taxi plate license on the secondary market could fluctuate:

Q. Well, you paid almost - which we're going to get to, but you paid almost \$200,000 for it. But I, I mean, I assume you thought the price was going to go up. Right?

A. It depends. It's going to be going up.

Q. It might go up. It might go down.

A. Yes. It is a business. Yeah.

⁵⁷⁹ *Ibid*, p. 123, lines 1- 26.

⁵⁸⁰ Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 57, lines 10-23.

Q. Okay. Great. Like, like any business you...

A. Yeah.

Q. ...you invest in.

A. Exactly.⁵⁸¹ [*emphasis added*]

499. The plaintiffs did not rely on representations that their investment would be safe. Rather, they understood, or ought to have understood, that by purchasing plate licenses on an unregulated secondary market, they were investing in a speculative asset. They had, or ought to have had, an appreciation of the risks in doing so.

(11) Many of the plaintiffs did not undertake even minimal due diligence

500. To the extent that members of the plaintiff class were blind to the risks, that blindness was a result of their failing to undertake basic due diligence prior to purchasing their plates. Indeed, aside from Mr. Way, every single one of the plaintiffs' plate holder witnesses failed to undertake the basic research or investigation that would reasonably be expected of any individual making an investment decision.

501. Mr. Mail is a trained engineer, and was third or fourth in the governmental hierarchy of his home province of Mazar-e-Sharif prior to leaving Afghanistan.⁵⁸² After coming to Canada, he was involved in a variety of businesses. He opened a restaurant in Hull with a business partner,⁵⁸³ and later invested money to gain a 50% ownership in a convenience store at a gas station.⁵⁸⁴ Mr. Mail is a sophisticated businessperson, capable of assessing the potential risk and reward of various businesses and investment vehicles.

502. However, when it came to his purchase of a plate license, he confirmed that he did not consult a business advisor, appraiser, or valuator prior to purchasing his plate on the secondary market.⁵⁸⁵ The extent of his research involved speaking with "people which was on the road drive and from people

⁵⁸¹ Yeshitla Dadi, Cross-Examination, January 23, 2023, *supra* note 26, at p. 121, line 27 – p. 122, line 4.

⁵⁸² Iskhak Mail, Examination in Chief, January 18, 2023, *supra* note 492, at p. 90, lines 1-8.

⁵⁸³ Iskhak Mail, Cross-Examination, January 19, 2023, *supra* note 26, at p. 12, lines 3-7.

⁵⁸⁴ *Ibid*, p. 57, lines 3-14.

⁵⁸⁵ *Ibid* p. 15, lines 7-17 and lines 3-14.

which was, I knowing from our community.”⁵⁸⁶ Furthermore, he did not even read the 2012 By-law, or any part of the by-law, prior to his purchase.⁵⁸⁷

503. Mr. Dadi too knows what type of research is typically required before making a major investment. When purchasing his house, he employed a real estate agent and a lawyer, and made sure he knew the sale prices of other properties in the area.⁵⁸⁸

504. Yet, Mr. Dadi testified that he never read any of the City’s taxi by-laws, even before purchasing his plate license.⁵⁸⁹ Further, he gave the following evidence, when asked about the research that informed his purchase of a plate license:

Q. All right. So you didn't consult a lawyer or a business valuator or a broker. What research did you do to figure out how much the plate was worth?

A. I didn't do nothing. Just - I know that, that the, the - he asking me this amount of money. I'm interested to buy. Just – I buy.

Q. Okay. And were you generally aware of how much plates were selling for at the time?

A. No.

Q. No. You didn't ask any other drivers?

A. No.⁵⁹⁰ [*emphasis added*]

505. Indeed, the only individual that Mr. Dadi did apparently consult with respect to his purchase of a plate was Mr. Way, who loaned him \$15,800 to purchase his plate license.⁵⁹¹

506. Mr. El-Feghaly came to Canada as a trained accountant, after having worked for an accounting firm with 46 employees in Lebanon, along with offices in Dubai and Saudi Arabia.⁵⁹² He is familiar with different types of investments, and has invested in RESPs for his children.⁵⁹³ He has made other large

⁵⁸⁶ *Ibid*, p. 56, lines 26-32

⁵⁸⁷ *Ibid*, p. 54, lines 6-10.

⁵⁸⁸ Yeshitla Dadi, Cross-Examination, January 23, 2023, *supra* note 26, at p. 137, lines 12-29.

⁵⁸⁹ *Ibid* at p. 118, lines 17-26.

⁵⁹⁰ *Ibid*, p. 131, lines 21-31.

⁵⁹¹ *Ibid*, p. 128, lines 3-6.

⁵⁹² Antoine El-Feghaly, Cross-Examination, January 25, 2023, *supra* note 26, at p. 95, lines 18-27.

⁵⁹³ *Ibid*, p. 108, lines 4-8.

investments, including purchasing a house in 2007 for approximately \$315,000.⁵⁹⁴ Mr. El-Feghaly is clearly capable of navigating and comparing different investment vehicles. Nonetheless, Mr. El-Feghaly did not undertake even the minimal due diligence of reading the City's taxi by-law prior to purchasing his plate license.⁵⁹⁵

507. Prior to entering the taxi industry, Mr. Mezher simultaneously managed three separate gas stations, where he was "responsible for everything on the station."⁵⁹⁶ He is a knowledgeable businessperson who, like Mr. El-Feghaly, holds investments in an RRSP and TFSA account.⁵⁹⁷ He too purchased a house, in his case for \$308,000 on April 25, 2007.⁵⁹⁸ Again, Mr. Mezher is capable of navigating and comparing different investment vehicles. However, Mr. Mezher too confirmed that he did not even read the City's taxi by-law in force at the time prior to purchasing his plate license.⁵⁹⁹

508. Messrs. Dadi, El-Feghaly, Mail and Mezher were the only single plate license holders called by the plaintiffs, and the only such license holders that the Court heard from. Their evidence must be taken as representative of the broader class. That evidence demonstrates that even though these individuals were experienced in business and familiar with different types of investing, they failed to undertake even the minimal due diligence step of reading the City's taxi by-law prior to purchasing their plate license.

509. Under these circumstances, the plaintiffs cannot credibly claim that they relied on (amorphous and nonspecific) "representations" from the City when purchasing their plate licenses, when they did not even attempt to understand the regulatory regime that they were supposedly investing in. Rather, the evidence suggests that to the extent the plaintiffs relied on any representations in purchasing their plates, those representations came from other drivers, friends, or, in Mr. Dadi's case, potentially Mr. Way.

⁵⁹⁴ *Ibid*, p. 112, lines 5-8.

⁵⁹⁵ *Ibid*, p. 102 line 14.

⁵⁹⁶ Ziad Mezher, Examination in Chief, January 17, 2023, p.125, line 20 – p. 126, line 11.

⁵⁹⁷ Ziad Mezher, Cross-Examination, January 18, 2023, *supra* note 26, at p. 70, lines 3-7.

⁵⁹⁸ Exhibit 68, Title Search – 2122 Gardenway Dr., B-1-6418.

⁵⁹⁹ Ziad Mezher, Cross-Examination, January 18, 2023, *supra* note 26, at p. 65, lines 19-20.

III) Analysis – there is insufficient proximity to give rise to a duty of care

510. The plaintiffs plead a number of “circumstances” that “enhanced” their “relationship of proximity” with the City. These circumstances can be grouped thematically into five categories, as set out in the chart below.

	Amended Amended Statement of Claim, paragraph 19⁶⁰⁰	Essential allegation
1.	<p>a) The City created and maintained a regulatory scheme for taxi services in Ottawa;</p> <p>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;</p> <p>e) The regulatory scheme created and maintained the market value of the Plates;</p> <p>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;</p>	Proximity arises from the City’s enactment of a taxicab regulatory regime, in which: (1) the supply of taxi plates is limited; (2) taxi licenses are transferable for consideration on the secondary market; and (3) taxi fares are set by the City.
2.	<p>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;</p> <p>j) The City directly benefitted from the market value of the Plates, including through fees levied on the transfer of Plates; and</p>	Proximity arises as a result of the City’s monitoring of plate transfer values and levying of fees on those transfers.
3.	<p>b) In order to function effectively, the regulatory scheme required investment by Class Members and collaboration between the City and Class Members;</p> <p>c) The Class Members have a significant interest in the integrity of the regulatory scheme;</p>	The plaintiffs’ participation in the regulatory regime enacted by the City, including by “investment” and “collaboration” gave rise to proximity sufficient to found a duty of care.
4.	<p>h) The City represented to Class Members that sound public policy reasons justified</p>	The City made representations to the plaintiffs.

⁶⁰⁰ Amended Amended Statement of Claim, *supra* note 2, at para. 19, pp. B-1-5681-82.

	<p>maintaining the market value of the Plates and maintaining the limits on the number of Plates issued by the City;</p> <p>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;</p>	
5.	<p>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</p>	<p>The plaintiffs relied upon the City's conduct.</p>

511. In the interests of avoiding repetition, the factors allegedly giving rise to proximity that have been pled by the plaintiffs are addressed below by category, rather than individually.

(1) The creation and maintenance of a supply-managed regulatory regime does not give rise to a duty of care

512. The claims that the City “created and maintained a regulatory scheme for taxis” that “created and maintained the market value of taxi plates”⁶⁰¹ merely reiterates the argument that the regulatory scheme itself gives rise to a duty of care. For the reasons discussed above, the regulatory regime does not give rise to a duty of care on the part of the City to prevent economic losses to the plaintiffs caused by the noncompliant conduct of third parties. If the regulatory regime does not give rise to a duty of care, then the City’s act of establishing that regime does not give rise to a duty of care.

513. The City’s ongoing regulation of both taxi fares and plate limits is merely demonstrative of the City’s role within the regulatory regime. Although the regulatory regime established by the City permitted plate transfers, the City played no role in determining the value at which plates were transferred. There is no evidence that the City “encouraged” the growth in plate values. It merely maintained a limit on

⁶⁰¹ Amended Amended Statement of Claim, *supra* note 2, at paras. 19(a) and (e), pp. B-1-5681-82

plates issued (an extremely common practice across North America) in order to ensure that the taxicabs were meeting basic standards designed to protect public safety.

514. The conduct captured by these allegations amounts merely to the City discharging its statutory responsibilities in the public interest, and does not give rise to proximity sufficient to found a duty of care.⁶⁰²

(2) The City’s monitoring of plate values of collection of fees relating to plate transfers does not give rise to proximity

515. The City took no role in “monitoring” the “market value” of plate licenses beyond ensuring compliance with the provisions of the by-law requiring the transferee of a plate license to provide affidavit evidence of the consideration paid. In so doing, the City was once again merely executing its role within the statutory regime.

516. The City did not determine the value at which plates were transferred. It did not independently verify the transfer values that were reported, and it was often lied to by transferees reporting inaccurate transfer values. These interactions clearly fall within the scope of the ordinary relationship between regulator and regulated, and do not give rise to proximity.

517. The City’s collection of fees related to plate license transfers is a similar manifestation of the regulatory regime. The requirement for the fee is specified in the 2012 By-law, and by collecting the fee, the City was merely playing its specified role within the regulatory regime. The plaintiffs’ payment of plate transfer fees and reporting to the City of plate transfer values are interactions that are inherent to the regulatory framework, and do not give rise to proximity.⁶⁰³

518. Indeed, in *Eisenberg*, the plaintiffs raised both the City of Toronto’s collection of fees for plate transfers and its requirement that transferees disclose the value of plate transfers as factors giving rise

⁶⁰² *Aylmer Meat Packers Inc.*, *supra* note 448, at [para. 48](#), citing *The Los Angeles Salad Company Inc.*, *supra* note 448, at [para. 51](#).

⁶⁰³ *Wu*, *supra* note 451, at [para. 64](#); *Eisenberg* (Ont Div Ct), *supra* note 341, at [para. 53](#).

to a duty of care.⁶⁰⁴ In upholding the trial judge’s refusal to certify the proposed class action, the Divisional Court held that:

In this case, in my view, the pleaded interactions were nothing more than a manifestation of the regulator/regulated relationship. It goes without saying that a system of transferrable licences creates value in the licences. The City’s acknowledgement that it was aware of this value and its collection of fees for the transfer is not sufficient to create a relationship of proximity. There will necessarily be interactions between a regulator and those who are regulated. A casual comment about the value of a license cannot be sufficient to create a “special relationship”.⁶⁰⁵ [*emphasis added*]

(3) The plaintiffs did not invest in the regulatory regime

519. The sole “investments” identified by the plaintiffs are those expenses required to comply with the regulatory framework. Mr. Way explicitly acknowledged that:

- (a) He has not identified a single investment in the regulatory regime, other than what is required to comply with that regime,⁶⁰⁶ and
- (b) The City has never directed him or any other class members to make any specific investments in the regulatory regime.⁶⁰⁷

520. In short, the plaintiffs did not invest in the regulatory regime.

521. Rather, in order to lawfully participate in the taxi industry, the plaintiffs were required to satisfy regulations requiring certain permits and equipment, and prescribing certain standards for that equipment. This is no different than any other regulated business, be it a restaurant that must “invest” in a license, commercial kitchen equipment, furniture, and cleaning products, or a lawyer that must “invest” in a law degree and LSO license.

⁶⁰⁴ *Eisenberg* (Ont Div Ct) *supra* note 341, at paras. 49-50.

⁶⁰⁵ *Ibid* at para. 53.

⁶⁰⁶ Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 46, line 21 – p.47, line 7.

⁶⁰⁷ *Ibid*, p. 48, lines 6-10.

522. The plaintiffs have not identified any “investments” that are outside the scope of the regulatory framework. To the contrary, the only investments identified by the plaintiffs are those that are inherent in the regulatory framework, and as such do not give rise to proximity.⁶⁰⁸

(4) The plaintiffs collaboration with the City does not fall outside the scope of the regulatory framework

523. The plaintiffs would have this Court find that they entered into a “partnership of mutual reliance and responsibility” with respect to enforcement of the taxi by-law, in which the primary purpose of enforcement was to protect plate holders from competition by unlicensed bandit cabs. The evidence simply does not support this interpretation.

524. The City’s enforcement against bandit cabs was merely one part of its enforcement of the taxi regulatory regime more broadly. Like all enforcement of the City’s taxi regulatory regime, it was undertaken to promote public safety and consumer protection, rather than to insulate the plaintiffs from competition.

525. The plaintiffs’ allegation that they were “partners” in enforcement against bandit cabs, is not borne out by the evidence. The plaintiffs have demonstrated just two specific occasions in which the any member of the plaintiff class provided information to the City leading to an enforcement action against a bandit cab.

526. Even if the plaintiffs were the primary source of complaints to the City about bandit cabs, their ability to make these complaints was not unique, or special, or outside of the regulatory framework. Any person may make a complaint to the City about a potential violation of a by-law, and the City will investigate that claim and take enforcement measures as appropriate.

527. Indeed, between 2010 and 2014, the supposed height of collaboration, complaints relating to bandit cabs made up a small proportion of taxi-related complaints received by BLRS. The vast majority

⁶⁰⁸ *Wu*, *supra* note 451, at [para. 64](#).

of complaints relating to violations of the taxi by-law related to taxi driver conduct, and it is logical to infer that these complaints were not made by the plaintiffs. There is no evidence that the City prioritized the plaintiffs' complaints about bandit cabs over any other taxi-related complaints.

528. The interactions between the City and the plaintiffs with respect to bandit cabs were, again, within the ordinary scope of the regulatory relationship. The plaintiffs could and did avail themselves of the opportunity to identify instances of by-law noncompliance to the City. The City could and presumably did (although the plaintiffs have only identified two specific occasions) take enforcement measures based on the information supplied by the plaintiffs. In so doing, the City was simply fulfilling its role within the regulatory regime. Such an interaction is no different from one in which a member of the public complains about driver conduct, and the City takes enforcement measures.

529. Finally, the mere fact that the City established the Taxicab Stakeholder Working Group does not give rise to proximity. The group was established to facilitate dialogue within and between the taxi industry, to further the regulatory purposes of consumer protection and public safety. There is no evidence the group was intended to establish special protections for the economic interests of the plaintiffs.

530. In *Flying E Ranche*, the evidence established that over a period of decades, the Government of Canada had, through its various agencies, extensively consulted with members of the cattle industry and industry stakeholder groups, including through formal consultative committees, regarding various aspects of the regulation of the industry.⁶⁰⁹ The Court nonetheless held that:

[614] ... consultations with industry, do not on their own create a duty of care. Governments are expected to consult with those affected by their actions and do so frequently, especially with regulated industries. This is not to ensure, however, that government is doing what an industry wants or is acting in the interests of that industry, but to ensure that government is acting in the public interest on the best information available, including input from affected stakeholders, and that those stakeholders are aware of what the government is doing, or not, and why.

⁶⁰⁹ *Flying E Ranche Ltd.*, *supra* note 454, at paras. 17, 163-168, 254-264, 329-330

[615] The types of interactions raised in this case were all, essentially, in furtherance of achieving the purposes and objectives of the [ADPA](#), [HAA](#), *Feeds Act*, the *DAAA* and other legislation. They do not qualify as “specific interactions” in which the government has “assumed duties separate and apart from its governing statute”: *Imperial Tobacco*, at paras. 45 and 53. Nor are the interactions “distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator’s work”: *Taylor (ONCA)*, at para. 80. To use the words of the British Columbia Court of Appeal in *Wu v. Vancouver (City)*, [2019 BCCA 23](#), [2019] 9 W.W.R. 565, at para. [64](#), the consultations were “generic and inherent in the regulatory framework and, accordingly, are not indicative of a relationship of proximity.”

[616] AAFC consulted with a wide range of stakeholders regarding BSE. Cattle farmers were not singled out by the Department, or under the regulatory regime, for special treatment or protection...⁶¹⁰ [*emphasis added*]

531. While there is no evidence in this case that the consultations between the City and the plaintiffs occurred with the degree of frequency or intensity as those identified in *Flying E Ranche*, the point is that mere consultation with the taxi industry, through the Taxicab Stakeholder Working Group or other venues, does not give rise to proximity. Such interactions are inherent to the regulatory relationship of a heavily regulated industry. Indeed, it would have been irresponsible for the City not to establish venues to consult with industry stakeholders.

(5) The plaintiffs did not rely on representations from the City

532. The starting point for the plaintiffs’ allegations of reliance on representations is that they have not pled negligent misrepresentation. Nevertheless, the evidence is clear that in this case, the plaintiffs applied for and received licences under the regulatory regime without specific interactions or advice or directions from City officials.⁶¹¹ Further, there is no evidence of specific representations made by any City officials to the plaintiffs as to any specific course of conduct, much less a representation intended to induce reliance.⁶¹² As such, no negligent representation occurred.

533. Instead, the plaintiffs seek to rely on vague “public representations” by the City. Since long before amalgamation, the City and its predecessors have consistently publicly represented that: (1) they retain ownership of taxi plates at all times; and (2) that they may enact regulatory changes, without any

⁶¹⁰ *Ibid* at paras. [614-616](#).

⁶¹¹ *Eisenberg* (Ont Sup Ct), *supra* note 339, at [para. 123](#).

⁶¹² *Charlesfort Developments Ltd.*, *supra* note 459, at [paras. 36-38](#).

obligation to compensate those who have purchased plate licenses. Under the circumstances, the plaintiffs cannot credibly claim that they relied on representations that their investment “would be safe.”⁶¹³

534. The evidence demonstrates that there are two groups of plaintiffs: those who knowingly made speculative investments, understanding that financial gain was not guaranteed, and those that did not understand the speculative nature of their investment because they failed to undertake minimal due diligence. Both now look to the City to underwrite their speculation.

535. Finally, public representations made by City officials regarding their views on Uber are specifically the type of public acknowledgement of a regulator’s public duties that do not give rise to proximity sufficient to found a duty of care.⁶¹⁴

(6) Conclusion – there is no proximity

536. Just as in *Eisenberg*, there is nothing about the evidence that takes the plaintiffs “beyond their status as a regulated industry.” The City did not undertake to enforce the 2012 By-law against Uber for the purpose of protecting the plaintiffs’ financial interests. There is no evidence of any investment, representation or arrangement separate and apart from the regulatory regime that requires the City to protect the plaintiffs’ commercial interests. The plaintiffs rely merely on the City’s powers to enforce its by-laws, and the alleged knowledge that a failure to do so would cause the plaintiffs harm.⁶¹⁵

537. This is not sufficient to establish proximity, and therefore no *prima facie* duty of care exists.

⁶¹³ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 7.

⁶¹⁴ *Taylor*, *supra* note 344, at paras. 95 and 118; *Flying E Ranche*, *supra* note 454, at paras. 599-600.

⁶¹⁵ *Eisenberg* (Ont Div Ct), *supra* note 341, at para. 58.

C) Policy reasons to negate a duty of care

538. In the alternative, if a *prima facie* duty of care exists, then the Court must consider whether there are residual policy reasons sufficient to negate recognizing a duty of care. As the Supreme Court recognized in *Cooper*:

These [residual policy considerations] are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?⁶¹⁶ [*emphasis added*]

539. In this case, the spectre of unlimited liability to an unlimited class clearly exists.

540. The City of Ottawa regulates approximately 35 business licensing categories in addition to the three categories of licensed vehicles for hire.⁶¹⁷ Imposing a duty on the City to protect the economic interests of one class of licensees from unlicensed competition raises the spectre of indeterminate liability from the City's other licensing categories. As the Divisional Court recognized in *Eisenberg*:

In any event, I agree with the motion judge's conclusion that indeterminate liability militates against imposing a duty of care on the City to protect the economic interests of the appellants. The City licenses and regulates many businesses in Toronto. Any number of factors may affect the value of those businesses, including competition from unlicensed or unlawful businesses. To impose a duty of care on the City to protect licensed businesses from competition from unlicensed businesses opens municipalities to the spectre of unlimited liability. Municipalities have limited resources. How they choose to allocate their limited resources to enforce by-laws should not be driven by the risk of claims for economic loss by other businesses.⁶¹⁸ [*emphasis added*]

541. Furthermore, such a recognition would necessarily have precedential implications outside of Ottawa, and as the Court of Appeal recognized in *Vlanich*, the burden of unlimited liability would be particularly acute on small municipalities.⁶¹⁹

⁶¹⁶ *Cooper*, *supra* note 340 at [para. 37](#).

⁶¹⁷ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 81, lines 21-26.

⁶¹⁸ *Eisenberg* (Ont Div Ct), *supra* note 341, at [para. 62](#).

⁶¹⁹ *Vlanich*, *supra* note 346, at [para. 48](#).

542. Finally, given the widespread establishment of Uber across Canada, and the fact that most Canadian municipalities have responded to the arrival of Uber in a broadly similar manner,⁶²⁰ a recognition of a duty of care in this case would likely have national implications, raising the spectre of unlimited liability across the county.

2) The Standard of Care

543. In the further alternative, if the City owes the plaintiffs a duty of care that is not negated by policy reasons, the City did not breach the standard of care.

A) Legal Principles

1) The plaintiffs did not meet their burden to establish the standard of care

544. The onus is on the plaintiffs to introduce evidence to establish both; (1) the applicable standard of care; and (2) that the City failed to meet the applicable standard. They have not done so, despite ample opportunity. This failure, on its own, is sufficient to dismiss their claim.

545. In *Thériault et al v. Lanthier et al*, the plaintiff claimed that the Town of Champlain (through its building inspector, Lacelle) was negligent in its inspection of a house that the plaintiff purchased. However, the plaintiff completely failed to introduce evidence to allow the court to discern the applicable standard of care. In dismissing the claim, the Court held that:

The onus is on the plaintiff to introduce evidence to show what standard of care was expected of Lacelle and establish that Lacelle failed to meet that standard. Unfortunately, there is a total absence of evidence permitting the court to find what standard of care was expected of Lacelle. One of the main breaches alleged against Lacelle was that he allowed the construction to proceed below the water table. However, there is no evidence that Lacelle was required to do more than he did. He attended and saw some water in the forms which he attributed to rain and directed Hotte to remove the water before pouring the concrete. The court is asked to make a finding of professional negligence without any evidence of what was expected of the reasonable inspector in like circumstances.

Similarly, the plaintiff alleges that it was negligent for the municipality to wait for Hotte to call before returning to the site and not to have some type of bring forward system and so on. Again, there is no evidence as to what a reasonable municipality is expected to put in

⁶²⁰ Brian Bourns, Examination in Chief, January 31, 2023, *supra* note 105, at p. 32, lines 9-16; Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 112, line 29 – p. 113, line 14; p. 114, lines 17-22.

place to meet its standard of care. Therefore on that basis alone, the plaintiff's claim against Champlain fails.⁶²¹ [emphasis added]

546. Similarly, in *Foodinvest v. Royal Bank*, the Court granted summary judgment in favour of the defendant RBC in part on the basis that the plaintiff had “put in no evidence demonstrating the applicable standard of care of a financial institution in the position that the Defendant found itself in.” As a consequence of that lack of evidence, the Court was “compelled to conclude that the Plaintiff will not be able to prove its case.”⁶²²

547. Finally, In *118143 Ontario Inc. (Canamex Promotions) v. Mississauga (City)*, the plaintiff's claim against the City for negligent enforcement of its sign by-law was dismissed on the basis that the City did not owe a duty of care. The plaintiff appealed in part on the basis that the trial judge failed to identify the applicable standard of care, and failed to determine if the City met that standard. In dismissing the appeal, the Court of Appeal emphasized that burden is on the claimant to establish both the standard of care and a breach of that standard, and found that the plaintiffs had failed to meet that burden. It held that:

[37] There is no statutory provision shifting the burden of proof as it applies to the standard of care from the appellants to Mississauga. Nor have the appellants offered any policy-based reason justifying a departure from a rule as fundamental as the rule which dictates that a party making an allegation must prove the allegation.

[38] The appellants were in a position to lead evidence as to what steps a reasonable municipality should have taken before enforcing its by-law in the circumstances that existed in May 2002. The appellants were equally in a position to lead evidence as to what steps Mississauga did or not take, and the reasons for those steps. The appellants had access to their own lawyer, who had negotiated with Mississauga, and to witnesses for Mississauga, both through the discovery and the trial process. The appellants had more than an ample opportunity to put evidentiary flesh on the bare bones of their negligence pleading. In the end, even if this court were to accept the appellants' articulation of the applicable standard of care, there was simply no evidence from which it could be inferred that Mississauga acted unreasonably in the enforcement of the 2002 By-law.⁶²³ [emphasis added]

⁶²¹ *Thériault et al v. Lanthier et al*, 2010 ONSC 655 at paras. 144-145 [Thériault].

⁶²² *Foodinvest Limited v. Royal Bank*, 2018 ONSC 7742 at paras. 19 and 31 [Foodinvest Limited].

⁶²³ *118143 Ontario Inc. (Canamex Promotions) v. Mississauga (City)*, 2016 ONCA 620 [118143 Ontario Inc. (Canamex Promotions)]

548. This Court can and should dismiss the plaintiffs' claim on the basis that they have not led any evidence that would allow this Court to determine the applicable standard of care. In the alternative, any claims by the plaintiffs as to what "a reasonable municipality in the City's position" would have done should be given no weight, as they are utterly unsupported by any evidence.⁶²⁴

II) The analysis of the standard of care requires deference to the City

549. In addition to failing to lead any evidence that could establish the standard of care, the plaintiffs do not apply the proper legal analysis to the issue.

550. The plaintiffs characterize the applicable standard of care as simply being that of an ordinary, reasonable and prudent person in similar circumstances, relying on the Supreme Court's decision in *Nelson (City) v. Marchi*.⁶²⁵ This characterization is incomplete, as *Nelson* involved a claim of negligence in relation to the city's snow clearing – a claim that engages the established duty of public authorities to keep roads reasonably safe.⁶²⁶ The legal context for claims for negligent enforcement of a by-law is different, and the plaintiffs fail to engage with the case law that consistently highlights the deference owed to municipalities when evaluating this type of claim.

551. As a starting point, "the law for some long time has been that there is no duty upon a municipality to enforce a by-law which it has enacted in the exercise of a discretionary power".⁶²⁷ A municipality has no obligation to take any steps to enforce such a by-law, including by prosecuting breaches of the by-law or suing to enforce its provisions.⁶²⁸

⁶²⁴ See e.g. Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11 at paras. 249, 255, 267, 268, 269 and 280.

⁶²⁵ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 247.

⁶²⁶ *Nelson (City) v. Marchi*, 2021 SCC 41, at para. 23 [Nelson (City)].

⁶²⁷ *Eisenberg* (Ont Sup Ct), *supra* note 339, at para. 106., citing *Freitag v. Penetanguishene (Town)* [2005] O.J. No. 4019 (Ont Div Ct) at para. 13 [Freitag]; and *Suprun v. Bryla* [2007] O.J. No. 4951 (Ont Sup Ct) at paras. 68-69 [Suprun]; aff'm 2008 ONCA 94.

⁶²⁸ *Sapone v. Clarington (Municipality)* 2001 CarswellOnt 5905 (Ont Sup. Ct.) at paras. 9-14 [Sapone]., citing *City of Toronto v. Polai* 1969 CanLII 33 (ONCA) at para. 14 [Polai (ONCA)] aff'm 1972 CanLII 22 (SCC) [Polai (SCC)].

552. If a municipality chooses to enforce a by-law, it has broad discretion in how it does so, provided that the municipality acts reasonably and in good faith.⁶²⁹

553. This discretion “should not be lightly interfered with.” Absent evidence of bad faith or unreasonableness, the Court should defer to the “real-world,” “day-to-day expertise” of a municipality in the enforcement of its by-laws.⁶³⁰ In this case, the plaintiffs have led no evidence of bad faith, or evidence to establish the standard of reasonableness from which they must prove a departure.

554. Although the plaintiffs have led no evidence of best practices, even a departure from known “best practices” of enforcement is not evidence of unreasonableness or bad faith.⁶³¹

555. If a municipality chooses to enforce a by-law, the applicable standard of care requires enforcement officers to:

- (a) act in good faith in relation to their decisions as to how a by-law will be enforced; and
- (b) act with reasonable care in any steps they take to enforce a by-law.⁶³²

B) Evidence and Analysis

I) The context before Uber’s arrival in Ottawa

(1) What is Uber?

556. The parties agree that that for the purposes of this proceeding, the term “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 (“app”) and licence businesses in relation to

⁶²⁹ *Ibid.*

⁶²⁹ *Donnell v. Joseph* 2012 ONCA 240 at para. 29 [*Donnell*]. See also *Foley v. Shames* 2008 ONCA 588 at para. 29 [*Foley*].; *Rausch*, *supra* note 340, at para. 88.

⁶³⁰ *Donnell*, *ibid* at para. 31 [*Donnell*].

⁶³¹ *Vlanich v. Typhair* 2014 ONSC 6245 (Ont. Sup. Ct.) at para. 49; *aff’m* by ONCA *supra* note 346, at para. 61.

⁶³² *Rausch*, *supra* note 340, at para. 88; *Foley*, *supra* note 629, at para. 29.;

facilitating private transportation services for compensation through telecommunications platforms and/or a digital network.⁶³³

557. Beyond this agreement, no specific evidence was led as to the corporate structure of Uber, or the manner in which the app functions. However, both aspects of Uber were considered by Justice Dunphy in his 2015 decision in *City of Toronto v. Uber Canada Inc. et al* ("**Toronto v. Uber**").⁶³⁴ The decision involved an application brought by the City of Toronto against various corporate entities affiliated with Uber, seeking: the following relief:

- (a) A declaration that the respondents are operating a taxicab brokerage in the City contrary to c. 545 of the *City of Toronto Municipal Code* (the "Code");
- (b) A declaration that the respondents are operating a limousine service company in the City contrary to c. 545 of the Code;
- (c) A permanent injunction restraining the respondents from:
 - (i) Operating a taxicab brokerage and limousine service company in Toronto without a valid municipal license;
 - (ii) Registering, contracting with or creating accounts for users to arrange or provide rides or communicate or exchange any information and facilitate rides from any location within Toronto, through its applications;
 - (iii) Recruiting, contracting with or registering drivers to provide transportation originating from any location within Toronto; and
 - (iv) Advertising or promoting the availability of transportation either arranged or facilitated by Uber from any location within Toronto;
- (d) A mandatory order requiring Uber to post a copy of any order on its website; and
- (e) A mandatory order requiring Uber to deliver an electronic copy of any order made to all users who have used the App to take trips in the Greater Toronto Area.⁶³⁵

558. The decision turned on the precise interplay of Uber's corporate structure and the functionality of its app, in relation to the wording of Chapter 545 of the Toronto Municipal Code, and Justice Dunphy

⁶³³ Statement of Agreed Facts, *supra* note 1, at para. 28, p. F6; Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 96.

⁶³⁴ *City of Toronto v. Uber Canada et al.*, 2015 ONSC 3572 [Uber].

⁶³⁵ *Ibid* at para. 48.

made a number of factual findings that are both relevant and instructive to the instant case. To begin with, he described the corporate structure of Uber as follows:

[29] Uber Canada Inc. markets the Uber brand to the public locally. It assists in recruiting drivers (who, when recruited, contract with other Uber entities). It has a limited role in pricing (specifically, the timing of removal of surge pricing). It handles service complaints when received, and it has a general role in reviewing and analyzing service data and "heat maps" to assist in the fine-tuning of the system to meet local conditions. It can cause the accounts of riders and drivers under their respective [page408] App to be suspended or deactivated. Uber Canada has offices in Toronto but provides its supporting services across Canada.

[30] Uber Canada provides what might best be described as ancillary local services within the overall "Uber" international business model. It does not own, operate or license to end-users the smartphone or Internet application (the "App") used by passengers (the "Rider App") nor the App used by drivers (the "Driver App"). It does not contract directly with drivers or passengers nor collect the fares charged by the one and paid by the other. From the evidence before me, Uber Canada has no contact with the prospective passenger prior to or during any particular trip. It may become involved if the passenger has complaints to register after the fact.

[31] Uber B.V. is a Dutch company. Prospective passengers wishing to use Uber's services may download the Rider App freely on the Internet. In order to use it, however, they must open an account and enter into an agreement with Uber B.V. authorizing them to use the Rider App around the world, including in Toronto. Whenever licensed users of the Rider App are in a location to which drivers can be summoned using the Driver App, the authorized user can do so. Among the locations in the world where this is possible is Toronto.

[32] In addition to licensing the Rider App, Uber B.V. licences the Driver App to drivers who apply for the Uber Black, Uber SUV, Uber Taxi and Uber Access services and has agreements with them.

[33] Rasier Operations B.V. ("Rasier") is a Dutch company who licenses the Driver App to drivers who wish to provide services to riders using the Uber X and Uber XL services. Such drivers enter into separate agreements with Rasier.

[34] The Uber App itself is owned by yet another entity: Uber Technologies Inc. ("Uber Technologies"). Uber Technologies is not a party to this application. There has been no information placed before me identifying the owner or operator of the servers in Northern California which relays messages sent by the Rider App and the Driver App respectively, calculates fares, receives reviews and ratings, etc. There is certainly no evidence that any of the respondents own or operate the servers.⁶³⁶

⁶³⁶ *Ibid* at paras. 29-34.

559. Justice Dunphy then examined the process by which a passenger uses the Rider App to obtain transportation from a driver using the Driver App, and made the following findings of fact with respect to the interplay of those apps with the various corporate entities operating under the Uber umbrella:

[80] The passenger looking to find a driver must open an account with Uber B.V. after first downloading the Rider App anywhere in the world over the Internet. The software is in place on her phone long before any specific trip is intended, let alone a trip specifically in Toronto. Downloading the software and opening an account implies no obligation ever use it. There is nothing more than the potential that the software *might* be used to arrange transportation at this point.

[81] Uber B.V. alone interfaces with the potential customer at the point where an account is opened with the prospective Rider App user. On the evidence before me, Uber B.V. itself does *nothing more* until *after* the driver has already showed up at the door of the prospective passenger. Uber B.V. neither receives nor relays anything in relation to any specific trip before it occurs. Its role in opening an account with a rider may well be assisting the rider in locating unlicensed limousine drivers, but Uber B.V. does not actually do so when a specific trip is in mind.

[82] Pursuing the chain of events to the next level, the prospective passenger opens her smartphone and activates the Rider App. She selects a desired category of service and hits "send" to request a car. The passenger and her phone are the only players in the process at this juncture. If her phone were said to "accept" the call when she presses the send button, the phone is neither operated nor controlled by any of Uber.

[83] The request next heads out over the Internet heading towards a server in Northern California. To get there, of course, the message must pass through multiple servers and nodes on the Internet, each of which receives the message and relays it onwards towards the intended destination. None of these intermediary relay stations on the Internet knows more about what it is relaying than a pony on the Pony Express knows about the contents of the mail it carries. Each "receives" the data packet requesting a driver sent by the would-be passenger. None, however, "accepts" the data, since their intervention is purely automatic.

[84] Next the data arrives at the servers in Northern California. There is no suggestion that Uber owns or operates the servers whose owner/operator was not identified at the hearing. The servers have software systems which are able to generate data about traffic, customer demands and the like. As well, the systems are able to direct the request to the nearest driver whose Driver App indicates he or she is available.

[85] Once again, there is nothing "accepted" by the server. Like the Internet switches that preceded it, the server does no more than relay. The server may act as a smart phone directory, but it is only acting as a phone directory. No appointment is given or accepted as is the case with a human dispatcher/ operator.

[86] Lastly, the data packet arrives on the dashboard of the prospective driver whose Driver App has been activated on his smartphone. There, the Driver App translates the data into a request and gives the driver 15 seconds to consider it. At this point, if the driver does nothing, then nothing has been accepted and the data packet resumes its journey back to the server and on to another driver.

[87] When a driver presses "accept", it is finally possible to say that someone has undertaken to arrange transportation for someone else. The only person doing the accepting is the driver. Prior to that point, nothing has been accepted and all is purely [page423] algorithm-driver data relay in which Uber has not been shown to play any actual, active role.

[88] Uber Canada has no role whatsoever in this process. It helped recruit drivers, it assists in customer relations generally, but it has nothing to do with the process of a passenger seeking a driver with a car at the point where the passenger puts her virtual hand in the air to "hail" a car over the Internet. There is simply nothing in Uber Canada's limited role that approaches the concept of "accepting" any instructions from a passenger as regards booking any specific transportation.

[89] Rasier does license the Driver App to some drivers (Uber X and Uber XL) and Uber B.V. licences it to others. However, it is the driver himself and not Uber B.V. or Rasier who actually accepts. Uber B.V. and Rasier are involved in opening an account with the driver, but have no role in the actual reception of a request or its acceptance on the evidence before me.⁶³⁷

560. Justice Dunphy's characterization of the interplay of Uber's apps with its corporate structure accords with the evidence of Tania McCumber, who explained in cross-examination that Uber does not "dispatch" vehicles to a customer:

Q. On what basis?

A. Dispatching refers to actually directing or instructing someone to, to that passenger to take it from point A to point B.

Q. It refers to sending somebody?

A. And Uber did not.

Q. How, how did it not?

A. The application did.

Q. But the same thing.

A. No, it's not. It's not an individual that's sending someone to take that ride.

Q. Right?

A. It's actually in a computer application.

Q. Oh, so you mean in the sense that it's an object?

A. It's a, a electronic-based application in which someone requests a ride. And then it's up to the individual driver on whether or not they accept that ride. There's no dispatching to a specific individual. It's leaving it open for any individual to take that.

Q. Right. But so let's break that down a little bit. The — am I understanding you correctly that, is that because Uber is an app in the sense that it, it's software, it's not a person. That's, that's....

⁶³⁷ *Ibid* at paras. 80-89.

A. For the sending of transportation on a call.

Q. Right.

A. It's not an individual that's actually sending the call.⁶³⁸

561. The plaintiffs did not lead any evidence that would suggest Uber was structured or functioned differently as between Toronto and Ottawa. To the contrary, Mr. Way admitted that when it came to Uber's corporate structure, he was "not aware of the intricacy of Uber Canada", and "didn't know about the intricacy of who licensed what." He is still not sure about the role of Uber B.V.⁶³⁹

562. Furthermore, although the plaintiffs make broad assertions about the ostensible similarity of Uber's functioning and traditional taxicab dispatching,⁶⁴⁰ Mr. Way admitted that he does not understand the interplay between Uber's Driver App and Rider App:

MR. BURKE: Q. I'm asking you, sir, not to characterize it as dispatching or not dispatching. I'm simply asking you from a pure technical perspective as to what happens. That the software converts the request from the rider app to the driver app?

A. How would I know how it converts it from one platform to the other?

Q. I'm not asking you how. I'm asking you if it is your understanding that that's what happens?

A. If I don't understand how, I cannot understand it.

Q. So you — you're saying you don't know if it converts from the rider app to the driver app?

A. No, I don't know that.

Q. All right. But you understand that there's a rider app and a driver app?

A. That's right.

Q. And you understand that the message somehow gets between the rider app and the driver app?

A. Correct.⁶⁴¹ [*emphasis added*]

⁶³⁸ Cross-examination of Tania McCumber, February 7, 2023, *supra* note 537, at pp. 96-97.

⁶³⁹ Marc André Way, Cross-Examination, January 11 2023, *supra* note 328, at p. 60, line 29 – 61, line 25.

⁶⁴⁰ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 98.

⁶⁴¹ Marc André Way, Cross-Examination, January 11 2023, *supra* note 328, at p. 59, line 20 – 61, line 7.

563. Finally, the plaintiffs specifically highlight contacts between City staff and their counterparts in Toronto about how to deal with Uber, by implication suggesting that Uber was structured and functioned in the same manner in Ottawa as in Toronto.⁶⁴²

564. Given the lack of dispute or countervailing evidence, this Court should rely on Justice Dunphy's findings of fact regarding both the corporate structure of Uber, and the manner in which its Driver App and Rider App function and interact with that corporate structure.

(2) The City prepared for the arrival of Uber

565. The plaintiffs claim that the City acted unreasonably in failing to devise a "specific plan to deal with Uber and its drivers prior to their arrival."⁶⁴³ By this standard, the plaintiffs would require the City to devote scarce resources to develop a strategy to address a hypothetical future violation of its by-law, when the City: (1) had no evidence that the violation would occur; and (2) did not fully understand the nature of the potential violation. There is no evidence to support such a standard of care, which is plainly untenable on its face.

566. Much of this claim hinges on the plaintiffs' assertion that the "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."⁶⁴⁴ This is simply not correct.

567. In cross-examination, Mr. Way agreed that Uber did not present at the Washington conference, and in fact simply set up a suite at the same venue as the conference:

Q. All right. And, sir, your, your recollection is, is that in Washington in 2012, you first learned about Uber, correct?

A. Correct.

Q. And you also told us that Travis Kalanick was there. Mr. Kalanick being the CEO of Uber?

⁶⁴² Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 253.

⁶⁴³ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 249.

⁶⁴⁴ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 251.

A. Correct.

Q. And if I understood your evidence correctly, you recollected that he was a speaker at the conference?

A. He was present and I believe so, yes.

Q. You believe he was a speaker?

A. Not a speaker. It was a — he was — it was a off — a, a meeting that was held by invitation. So it was not — he was not an official speaker at the conference.

Q. Right. My understanding is that Uber set up a suite across the, across the hallway from where the actual conference was being held and had an open bar and invited people to come and see them. Is that your recollection?

A. There was — I don't remember the open bar, but there was a suite, yes.

Q. All right. There was a suite across the, across the hallway. And that's where they set up for the purposes of letting people know about Uber?

A. Yes.⁶⁴⁵

Q. All right. There was a suite across the, across the hallway. And that's where they set up for the purposes of letting people know about Uber?

A. Yes. [*emphasis added*]

568. Although Ms. Hartig and the then-chief of BLRS, Linda Anderson attended this conference, it was Ms. Hartig's evidence on cross-examination that she did not attend Uber's suite, and that she did know what Uber was at the time:

Q. And do you remember that Uber — do you recall if Uber had a suite across the hallway from the conference that had an open bar?

A. I heard that.

Q. So you'd heard of Uber at that point?

A. I didn't really know what it was, to be honest, it wasn't a thing here yet in Canada that is. And we didn't, we didn't go into the suite. We heard the other — a lot of the attendees at, at those conferences are American, so they were doing a lot of talking about it, and we were just hoping it would never come to Canada. But anyway.

Q. You were hoping it would never come to Canada?

A. That's right. Anyway, well, I guess maybe that's sort of a personal thing more — yeah. But we — but I heard that they had a suite there, but we didn't, we didn't go, we didn't attend.⁶⁴⁶ [*emphasis added*]

⁶⁴⁵ Marc André Way, Cross-Examination, January 11, 2023, *supra* note 328, at p.35, line 16 -36, line 2.

⁶⁴⁶ Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 109, lines 4-19.

569. City officials did participate in a 2014 meeting convened by the City of Toronto with taxicab regulators across the country to discuss Toronto's experiences with enforcement against Uber.⁶⁴⁷ However, as Ms. Jones described, the City's knowledge of Uber prior to its arrival in Ottawa was quite nonspecific and limited. She stated that "it was my understanding at, at the time, based on what I knew, is that we had a number of individuals operating under this technology and that they were operating as unlicensed taxi cabs and, and they were associated with Uber." In her view at the time, this activity would contravene the 2012 By-law.⁶⁴⁸

570. Beyond this broad understanding, there is no evidence that the City had any advance knowledge, prior to September 2014 of:

- (a) Whether Uber would begin operating in Ottawa;
- (b) The timeline in which that would occur;
- (c) The nature and relationship of the various entities comprising Uber; or
- (d) The manner in which Uber's apps functioned.

571. Indeed, until September 2014, Uber's operations in Canada were limited to Toronto. There was no reason for the City to conclude that Uber would necessarily expand to Ottawa.

572. Notwithstanding that City officials did not know if or when Uber would begin operating in Ottawa, they did take pre-emptive and specific measures to prepare for possible enforcement operations. Ms. Jones participated in the meeting convened by the City of Toronto, and Ms. Hartig spoke with her counterparts in Toronto about enforcement efforts against Uber, in the period prior to Uber's arrival in September 2014.⁶⁴⁹

⁶⁴⁷ Susan Jones, Cross-Examination, February 9, 2023, *supra* note 401, at p. 63, line 31 – p. 64, line 26.

⁶⁴⁸ Susan Jones, Cross-Examination, February 7, 2023, p. 67, lines 3 – 11.

⁶⁴⁹ Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 113, lines 6 – 27.

573. The plaintiffs have led no evidence or authorities to support the proposition that a municipality is required to devise a “plan” to address hypothetical violations of a by-law, in advance. This proposition strains credulity, and is contrary to the established case law providing municipalities with broad discretion when it comes to by-law enforcement, including the discretion not to enforce a by-law. However, the evidence demonstrates that City officials did take measures to gather information about Uber and discuss best practices with their counterparts, even though they are not required at law to do so.

574. The City’s conduct in terms of preparations prior to the arrival of Uber was plainly reasonable.

(3) The resources and responsibilities of BLRS

575. The City’s enforcement efforts against Uber must be assessed against the enforcement resources available to the City, and the pre-existing demands on those resources.

576. Like all law enforcement organizations, the City has limited resources in terms of personnel, equipment and finances. It could not devote all those resources exclusively to the enforcement of the 2012 By-law against Uber drivers. At all material times, the City was required to allocate resources to the enforcement of numerous by-laws beyond the 2012 By-law. This additional demand for enforcement pre-dated the arrival of Uber, persisted after the passage of the 2016 By-law, and could not simply be ignored.

577. BLRS is the City branch charged with enforcement of all City by-laws, including the 2012 By-law. In order to carry out this responsibility, between 2014 and 2016 BLRS employed approximately 160-170 full-time-equivalent (“FTE”) enforcement officers, deployed between three different functions:

- (a) Parking control officers, devoted exclusively to the enforcement of the City’s parking by-law;
- (b) Property standards officers, devoted exclusively to the enforcement of the City’s property standards and zoning by-laws; and

- (c) Generalist officers, devoted to enforcement of all other by-laws, including the 2012 By-law.⁶⁵⁰

578. Between 2014 and 2016, approximately 40 FTEs were generalists.⁶⁵¹ These were the only officers available to enforce the 2012 By-law against Uber, as property standards and parking control officers were not trained as generalists, and were occupied with their own specialized enforcement responsibilities.

579. The approximately 40 generalist FTEs were not all available at the same time, as BLRS officers work in shifts, and at any given time, eight to twelve generalists would be on duty.⁶⁵² These officers were responsible for responding to all by-law SRs that came in from the entire City, other than those specifically handled by parking or property standards officers.⁶⁵³ As Mr. Powers, a former generalist officer and former Supervisor in the generalist division described:

So my day to day would be we're, we're involved in responding to anything from as low of a priority as neighbour complaining about the grass being too long at an address to something as escalated, which would be a house party out of control for a noise complaint. To the most severe investigations, which would be under the animal care control by-law, which would be dog attacks on, on people or dog attacks on other animals that we would have to investigate and, and potentially issue charges and issue orders and stuff like that.⁶⁵⁴

580. The sheer volume of SRs received by those generalist officers is remarkable. In 2014, BLRS received a total of 45,846 SRs. When SRs related to parking, property standards and zoning are excluded, the total is still 33,017, an average of approximately 90 generalist SRs per day.⁶⁵⁵ Replicating this exercise for 2015 and 2016 demonstrates daily averages of approximately 92 and 83, respectively.⁶⁵⁶

⁶⁵⁰ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 82, lines 9-31 p. 85, lines 10-16.

⁶⁵¹ *Ibid*, at p. 83, lines 1-2.

⁶⁵² Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 29, line 23 – 30, line 2.

⁶⁵³ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 29, lines 5 -28.

⁶⁵⁴ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 29, lines 12-21.

⁶⁵⁵ Exhibit 1, Tab 126, *supra* note 528.

⁶⁵⁶ Exhibit 1, Tabs 126 and 127, *supra* note 528 and 532.

581. This was the context in which the City undertook enforcement efforts against Uber – at any given time, the City would have eight to twelve generalist enforcement officers available, for all by-law enforcement activities, across the entire City. Those eight to twelve officers could expect to receive, as a group, approximately 90 SRs on any given day. The allocation of officers specifically devoted to enforcement operations against Uber drivers would necessarily increase the burden on the remaining generalist officers, and reduce the resources available to respond to those SRs.

II) Uber's arrival in Ottawa

(1) The initial decision to focus on enforcement against drivers

582. Uber began accepting rides for compensation at the beginning of October 2014. The City began by-law enforcement operations against Uber drivers within one or two days.⁶⁵⁷

583. Based on their understanding of Uber's operations at the time of its arrival in Ottawa, City officials such as Ms. Jones were initially of the view that Uber was operating as an unlicensed broker contrary to the 2012 By-law, and that its drivers were operating unlicensed taxicabs and providing unlicensed taxicab service, contrary to the by-law.⁶⁵⁸

584. The provisions of the 2012 By-law regarding unlicensed operation as a broker and unlicensed operation as a taxicab differ from one another, and require different evidence to establish a breach.

585. With regard to taxicab drivers, sections 3 and 4 of the 2012 By-law, respectively, prohibit the operation of taxicab and the provision of taxicab service without a licence. A taxicab is defined as “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...” Taxicab service is defined as “the transportation of a passenger by taxicab from a point in the regulated area to any point within or beyond the regulated area [*of the City of Ottawa*].⁶⁵⁹

⁶⁵⁷ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 121, lines 3-5.

⁶⁵⁸ Susan Jones, Cross-Examination, February 9, 2023, *supra* note 401, at p. 82, line 31 – p. 83, line 4.

⁶⁵⁹ Exhibit 2, Tab 306, *supra* note 16, at ss. 1, 3 and 4, pp. F3902 and F3904.

586. Thus, in order to justify issuing a charge for contravention of the 2012 By-law against Uber drivers, BLRS officers were required to gather evidence establishing that the driver was operating a motor vehicle to transport passengers “for hire” (i.e. in exchange for compensation).

587. In contrast, establishing a breach of the provisions regulating dispatch of taxicabs is more onerous. Section 6 of the 2012 By-law prohibits the “dispatch” of taxicabs without a valid taxicab broker licence. The relevant terms are defined as follows:

“dispatch” means the act or service of sending or directing a taxicab, by electronic or any other means, to a person or persons who have requested taxicab service but does not include a request made directly to a taxicab driver

“taxicab 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;⁶⁶⁰

588. In order to justify issuing a charge for contravention of the 2012 By-law against any of the entities affiliated with Uber, BLRS officers were needed to gather evidence that the entity was “accepting calls” for the “act or service of sending or directing a taxicab”.

589. From the perspective of BLRS, the plan was to treat enforcement against Uber in the same manner as any other potential contravention of a by-law. Enforcement officers were required to investigate the contravention, gather evidence, and determine if charges for by-law contravention were warranted.⁶⁶¹

590. However, investigating and enforcing against Uber drivers could not be conducted in the same manner as it had been against traditional bandit cabs.

591. Traditional bandit cabs could typically be called directly by telephone, and often advertised their presence in bars, or attempted to pick up passengers at larger-scale events. They accepted payment directly from the passengers, and were often visually identified. Traditional bandit cabs could be easily

⁶⁶⁰ Exhibit 2, Tab 306, *supra* note 16, at ss. 1, 3 and 4, pp. F3899, F3902 and F3904.

⁶⁶¹ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 9, lines 9-32.

identified and targeted by officers posted at pickup locations or called by telephone, and charges could be laid on the basis of visual evidence of payment from the passenger to the driver.⁶⁶²

592. In contrast, Uber rides could only be requested, and payment could only be made, through the use of the Uber app.⁶⁶³ Uber vehicles were not visually identified. In order to lay charges, BLRS officers were required to use the app to request an Uber ride, identify the vehicle, pay for that ride through the app, and collect evidence of the ride and payment. As outlined below, Uber deployed unprecedented measures to hinder BLRS' use of the Uber app.

593. In cross-examination, Mr. Way agreed that enforcement against Uber drivers presented challenges that BLRS had not previously encountered in its enforcement efforts against traditional bandit cabs:

Q. Problematic. Thank you. And, sir, if you would also — would you also agree with me that the platform presented certain challenges that enforcement had not previously encountered? And one of those challenges would be that the PTC vehicles are not marked or publicly identified?

A. You're correct.

Q. All right. And further, you'll agree with me that under the Uber platform, there is no requirement for the user to call a central number to have a vehicle dispatched?

A. No, there's no telephone numbers.

Q. All right. And there would be no cash or credit card transaction that would be visible upon a passenger exiting the vehicle?

A. You would not see a physical transaction.⁶⁶⁴ [*emphasis added*]

594. The City knew that none of the corporate entities affiliated with Uber were located in Ottawa, and as such, identifying the parties involved in the ridesharing service and issuing charges against them would likely prove difficult. The City therefore made the reasonable decision to focus its initial enforcement efforts against Uber drivers. As Ms. Hartig stated in her cross-examination:

⁶⁶² Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 134, lines 11-22; Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 43, lines 3-14; Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 9, lines 18-30.

⁶⁶³ *Ibid.*

⁶⁶⁴ Marc André Way, Cross-Examination, January 11, 2023, *supra* note 328, at p. 145, line 22 – 146, line 3.

Q. And in 2014 you thought Uber was acting as a broker, that they should be licensed?

A. We didn't go down that road. There was — I mean it wasn't my decision, obviously, to — you know, that's what we're going to do. But we were more focused on dealing with the drivers that were operating in the City because my understanding at the time it was they didn't — I guess the managers or whatever of that, that app, whoever was in charge of all of it, they weren't in Ottawa physically as I recall.

Q. Okay.

A. They were somewhere else, like could have been any number of places, the Netherlands, San Francisco...

Q. Right.

A. ...is what we thought about a lot.⁶⁶⁵ [*emphasis added*]

595. As Ms. Hartig explained, the geographic challenges associated with identifying and charging the entities affiliated with Uber informed the manner in which the City's scarce enforcement resources were allocated:

Q. And did By-law and Regulatory Services lay any charges against any of the entities affiliated with Uber, or operating as a broker, in contravention of the 2012 by-law?

A. No.

Q. And, why not?

A. Well, it's kind of difficult to identify them. I mean, it's an app. So who would we charge? They weren't located in Ottawa. And, it seemed to make more sense, you know, with given resources, I, I suppose, rather than trying to find somebody in San Francisco or wherever they are, to charge them, to deal with the issues that we could within our, the boundaries of the City. Which would be the drivers, with a view to — if we can stop them from operating by using enforcement as a deterrent, then, then that should be sufficient. Because that really was the goal, is to stop them from operating as illegally in the City.⁶⁶⁶ [*emphasis added*]

596. The requirement to efficiently allocate scarce resources is clearly a reasonable basis upon which to make enforcement decisions. Indeed, in cross-examination, Mr. Way agreed that resources are expended even in circumstances where investigations related to by-law enforcement do not lead to the issuance of charges, and that the enforcement of by-laws is “a balancing exercise in terms of the need and available resources.”⁶⁶⁷

⁶⁶⁵ Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 110, lines 19-32.

⁶⁶⁶ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 138, line 27- p. 139, line 10.

⁶⁶⁷ Marc André Way, Cross-Examination, January 11 2023, *supra* note 328 p. 107, line 21 – 108, line 5.

597. Furthermore, by focusing first on enforcement against Uber drivers, the City was following the lead of the City of Toronto – at the time, the only city in the country that had dealt with the entry of Uber. Uber began operating in Toronto in August 2012, and Toronto pursued a strategy of enforcement against Uber drivers, rather than Uber’s corporate entities, for more than two years.⁶⁶⁸ It did not bring an injunction against the corporate entities affiliated with Uber until November 18, 2014.⁶⁶⁹

598. Once again, the plaintiffs have led no evidence that could establish the standard of care of a reasonable municipality in the position of the City of Ottawa. Regardless, the City’s decision to focus its initial enforcement strategy on Uber drivers instead of any of the corporate entities associated with Uber was plainly reasonable and within the scope of the City’s discretion. The decision was based on the need to efficiently allocate scarce enforcement resources and followed the model of the only other city in Canada that had deal with the entry of Uber.

(2) Unprecedented challenges and the development of BLRS’ enforcement strategies

599. Upon Uber’s entry into Ottawa, BLRS held a meeting attended by a select group of supervisors and enforcement officers – including Christine Hartig, Tania McCumber, Morgan Tam and Chris Powers. Attendees were briefed on the manner in which the Uber platform operates, and worked to develop a strategy for investigation and enforcement of potential breaches of the 2012 By-law by drivers utilizing this new technology.⁶⁷⁰

600. Following this meeting, the first enforcement action against an Uber driver occurred on October 4, 2014, and was conducted by Ms. Hartig and Mr. Powers. Although BLRS investigations are typically complaint-driven, this action was undertaken proactively. Its purpose was to gather information and

⁶⁶⁸ Exhibit 112, *supra* note 187 pp. F2990-F2991.

⁶⁶⁹ Exhibit 198, Email from Rick O’Connor to Council with Memo, p. F439.

⁶⁷⁰ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 6, line 10 – p. 8, line 4.

evidence to help BLRS better understand how the Uber platform worked, and if warranted, to issue charges.⁶⁷¹

601. Ms. Hartig downloaded the Uber app on October 3, and created a profile using her personal contact information and personal credit card – both elements are required to set up a new user profile. Ms. Hartig travelled to College Square, at the corner of Woodroffe Avenue and Baseline Road. She then used the app to request an Uber ride with a destination of 376 Bank Street. During this operation, Ms. Hartig was wearing a Bluetooth earpiece connected to her phone, and was in constant telephone contact with Mr. Powers, who was following in an unmarked vehicle. Once the ride was complete, Ms. Hartig took screenshots of the receipt and proof of her trip provided by the Uber app, to be used as evidence. As she was dropped off, Mr. Powers approached the Uber vehicle, collected the driver's information, and issued a Part I Provincial Offence Notice ("**PON**") to the driver for operation of an unlicensed taxicab and the provision of taxicab service without a licence, contrary to the 2012 By-law. Ms. Hartig then compiled her witness statement, Mr. Powers compiled his notes, and Mr. Powers filed the report of the investigation in BLRS' information management system.⁶⁷²

602. The same day, Ms. Hartig and Mr. Powers conducted a second enforcement operation based on this investigation model. Ms. Hartig requested an Uber to the Rideau Centre through the app, and was dropped off in Kanata. Once again, she was in contact with Mr. Powers the entire time, and once again, a Part I PON was issued to the Uber driver.⁶⁷³

603. By October 5th, Ms. Hartig's access to the Uber app had been disabled, and she was no longer able to use the app. She had been "locked out."⁶⁷⁴ Having an account locked out or blocked could manifest in various forms, ranging from the user being unable to create a user profile, to being unable

⁶⁷¹ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 121, lines 3-5; Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 7, lines 9-18.

⁶⁷² Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 124, line 24 – 126, line 25; Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 12, line 1 – p. 13, line 16.

⁶⁷³ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 130, lines 7-14.

⁶⁷⁴ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 130, line 24 – p. 131, line 5.

to input credit card information, but in all cases it prevented the user from calling a ride through the app.⁶⁷⁵

604. Ms. Hartig's experience was not unique – in fact, BLRS quickly discovered that Uber was deploying a series of sophisticated tactics to identify and “block” City employees' use of the app, in an attempt to assist its drivers in evading enforcement. BLRS was only able to discover these tactics through experience, and City employees never received any explanation from Uber as to why a given account had been blocked.⁶⁷⁶ However, over time, and based on experience, BLRS came to identify the following tactics:

- (a) As Ms. Hartig experienced, any user accounts associated with charges issued against Uber drivers would quickly be disabled or blocked, and would no longer be able to access the app;⁶⁷⁷
- (b) In addition to accounts being blocked, the mobile device itself associated with any account used to issue charges would be locked out, such that the device could no longer use the Uber app, even with a new account;⁶⁷⁸
- (c) The locking of a mobile device was also triggered geographically – if a mobile device was turned on the vicinity of City Hall or BLRS headquarters, it would frequently be locked immediately, or in short order;⁶⁷⁹
- (d) The credit card linked to any account associated with charges issued against a driver would also be identified, and could no longer be used on the Uber app;⁶⁸⁰ and

⁶⁷⁵ Morgan Tam, Examination in Chief, February 13, 2023, p. 61, lines 5 – 29.

⁶⁷⁶ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 25, lines 3-9.

⁶⁷⁷ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 131, lines 7-19.

⁶⁷⁸ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 25, lines 6-13.

⁶⁷⁹ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 25, lines 6-19;

⁶⁸⁰ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 132, line 19-24.

- (e) Finally, even credit cards with 12 starting digits similar to a locked card could not be used on the app.⁶⁸¹

605. Uber's unprecedented tactics were enabled through its use of "grey ball" software, which Mr.

Way described as follows:

First of all, grey ball is not only geo fencing. Grey ball is — it's much more than just geo fencing. The, the implications of grey ball are as deep as tracking personal information, credit card information and in, in relationship to identifying potential — law enforcement or By-law enforcements and other that would — are looking at using Uber or, or challenge Uber's arrival in a particular city.⁶⁸²

606. The challenges experienced by BLRS as a result of grey ball and Uber's associated tactics mirrored those experienced by Triangle Investigation, the private investigation service retained by Mr. Way to collect information on Uber and its drivers. Mr. Way agreed that Triangle experienced the same challenges as those faced by BLRS. Further, he agreed with the obvious point that these obstacles would constitute an impediment to an investigation:

Q. All right. And, sir, they were — you told us earlier today about the challenges that were associated with Uber identifying an account of an operative and then of a by-law official and shutting down that particular account. You were aware that those things were happening?

A. Yes.

Q. All right. And, sir, I take it that you agree with me that Triangle also experienced difficulties in its own investigations arising from having its accounts blocked due to geotracking or geofencing?

A. It happened.

Q. Yes. So you knew that that was an — a, a challenge that Triangle had experienced?

A. There were ways around the challenge, but it was a challenge, yes.

Q. All right. And, and, again, that was the same problem that By-law had experienced. Correct?

A. Correct.

Q. And, sir, we talked this morning about By-law having difficulties and a credit card not being accepted that might be registered on the Uber platform. Was that a problem also experienced by Triangle?

A. I can't say for sure.

⁶⁸¹ Morgan Tam, Examination in Chief, February 13, 2023, *supra* note 675, at p. 60, lines 18-29.

⁶⁸² Marc André Way, Re-Examination, January 17, 2023, *supra* note 122, at p.71, lines 17-23.

Q. You don't, you don't know if that...

A. I don't know that.

Q. ...experienced or not?

A. I don't know that.

Q. Okay, that's fair enough. And, sir, you'll agree with me that certainly shutting down of an account or the cancellation of a credit card would constitute an impediment to an investigation?

A. It's problematic, yes.⁶⁸³ [*emphasis added*]

607. Notwithstanding the unprecedented nature of the challenges posed by Uber's tactics, in October 2014 – the same month that Uber began operations – BLRS developed a strategy of its own to conduct enforcement against Uber drivers and to attempt to overcome these challenges. The main elements of this strategy included:

- (a) Two by-law officers in plain clothes would conduct the enforcement operation;
- (b) The officers would be given an equipment package including: two new “burner” mobile devices that had never been connected to Uber, which were preloaded with Uber accounts set up under alias names and linked to credit cards that had never been connected to Uber. The Uber accounts would be set up offsite, so as to avoid triggering geofencing around BLRS headquarters or City Hall. The officers would also be given two radio headsets, and an unmarked BLRS vehicle;
- (c) The officers would leave BLRS headquarters in the unmarked vehicle, and would not turn their mobile devices on until they were well away from headquarters, so as to avoid triggering geofencing;
- (d) The first officer would use the Uber app to request a ride, take the ride, and collect evidence, including the initial booking or screenshot of the, of the booking, which

⁶⁸³ Marc André Way, Cross-Examination, January 11, 2023, *supra* note 328, at p. 144, line 27 – 145, line 21.

indicates the driver name, photo, license plate, as well as a map of the route. The second officer would follow in an unmarked vehicle; and

- (e) The officers would relocate to a new location, switch roles, and repeat the procedure on the second phone.⁶⁸⁴

608. In the original iteration of this strategy, which was in place until approximately January 2015, the non-passenger officer would intercept the Uber driver immediately upon completion of the ride, and would issue a charge.⁶⁸⁵ However, BLRS officers eventually began seeing that their Uber accounts would be deactivated immediately upon the issuance of that charge, meaning that the mobile device, account, and credit card used would be “locked out” going forward. This would require the officers to return to BLRS headquarters to obtain an entirely new equipment package.⁶⁸⁶

609. As BLRS officers came to better understand Uber’s tactics, they developed countermeasures, and altered the initial strategy, including by:

- (a) Better mimicking the behaviour of a “normal” Uber customer by spending a longer period of time at their destination in between rides;
- (b) Taking more stringent precautions to avoid triggering geofencing when issuing charges or using their mobile devices; and
- (c) Taking a number of Uber rides without issuing charges, and then returning to BLRS headquarters to enter officer notes, evidence, and summaries of events. BLRS would then wait until it had a critical mass of evidence, and issue charges in batches.⁶⁸⁷

⁶⁸⁴ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 22, line 1 – p.23, line 7; Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 20, line 7 – p. 21, line 6; Morgan Tam, Examination in Chief, February 13, 2023, *supra* note 675, at p. 70, lines 20-23;

⁶⁸⁵ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 20, line 29 – p. 21, line 6.

⁶⁸⁶ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 21, lines 7 – 30.

⁶⁸⁷ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 21, line 31 – p. 22, line 31; Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 24, line 10 - p. 26, line 28.

610. This updated strategy was formalized in a document entitled “Enforcement Strategy: Unlicensed Taxi Drivers,” which was developed for training and briefing purposes, and was in place from January 2015 until the 2016 By-law came into force on September 30, 2016. It still forms the basis of BLRS’ enforcement tactics against PTCs operating in violation of the 2016 By-law.⁶⁸⁸

611. The City further altered its enforcement strategy by beginning to issue Uber drivers Part III summonses under the *Provincial Offences Act*. A Part III summons requires the charged individual to attend at Court, rather than pay the fine out of court, and can lead to a much higher fine being levied in comparison to a Part I PON. The City adopted this change in order to increase the deterrence level of its enforcement efforts.⁶⁸⁹

612. The plaintiffs claim that the City did not modify its overall strategy for enforcement against Uber at any time.⁶⁹⁰ The evidence detailed above demonstrates that this claim is simply false.

613. Indeed, it is notable that when, in re-examination, Mr. Way identified a number of methods that could be used to avoid “grey ball,” all of the tactics he listed were employed by BLRS. Mr. Way stated:

Q. So if I understand the evidence you just gave, the ways around grey ball are the ones you just listed?

A. Yes.

Q. Which were open another office close by, use a burner phone, apply for another credit card, use someone else’s credit card. Were there any other ways around grey ball?

A. The — it all relates to the technology and, and the telephone and the proximity of where you’re open — where the account is opening, the amount of usage that you’re doing so there — if they were able to establish patterns, things of that nature.⁶⁹¹

⁶⁸⁸ Exhibit 153, Enforcement Strategy Against Unlicensed Cabs, B-1-8540; Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 23, line – p. 24, line 16.

⁶⁸⁹ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 27, lines 13-25.

⁶⁹⁰ Plaintiffs’ Closing Submissions, *supra* note 11, at para 108.

⁶⁹¹ Marc André Way, Re-Examination, January 17, 2023, *supra* note 122, at p. 72 lines 4-14.

614. As outlined above, BLRS enforcement officers, employed, and were specifically directed to employ, all these tactics. They used burner phones, applied for credit cards under alias names, changed their usage patterns, and avoided opening the phones in geofenced areas.

615. Once again, the plaintiffs have led no evidence to establish the standard of care against which to compare BLRS' enforcement strategies. However, the evidence outlined above, and the alignment between the recommendations of the plaintiffs and the tactics employed by BLRS plainly demonstrates that those tactics were reasonable.

(3) The City deployed unprecedented resources to reasonably enforce against Uber drivers

616. The City employed the strategies outlined above to continuously and proactively enforce the 2012 By-law against Uber drivers from October 4, 2014 until the 2016 By-law came into effect on September 30, 2016. At no point was BLRS advised to cease enforcement against Uber drivers or any other PTC drivers, nor did it ever cease enforcement.⁶⁹² In the course of this enforcement, BLRS devoted unprecedented resources to enforcement of the 2012 By-law.

617. As discussed above, at any given time, there were eight to twelve generalist by-law officers on duty. These officers could expect to receive approximately 90 service requests per day. These generalists did not include the two enforcement officers in the “taxi unit,” who were solely dedicated to taxi complaints, and were not available for general enforcement.⁶⁹³

618. The City's enforcement strategy against Uber required two or three generalist officers – representing approximately 25% of all generalist officers on duty in the entire City – to be dedicated solely to enforcement of one element of the 2012 By-law for some or all of their shift.⁶⁹⁴

⁶⁹² Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 44, lines 14-19.

⁶⁹³ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 29, lines 22-32.

⁶⁹⁴ *Ibid*, at, p. 29, lines 11-12.

619. As Mr. Powers explained, “it was definitely like a balancing act of trying to maintain continuity of service and the special enforcement project.”⁶⁹⁵ He elaborated on the challenges posed by that balancing:

Q. And were there any challenges associated with balancing of your Uber enforcement duties with your standard enforcement duties?

A. Yeah. Like I said, it was, it's, it's all about trying to maintain continuity of the service because while I'm doing this enforcement or whoever's doing this enforcement, the calls are still coming in from non urgent matters to urgent matters. And you're also dealing with staffing level issues that are potentially, you know, if people calling sick kind of ruins your plans to do enforcement. So you just, it's, it's all about balancing.⁶⁹⁶

620. Beyond the challenges posed by the need to balance continuity of service with enforcement against Uber, the City incurred extraordinary financial costs in order to carry out BLRS’s enforcement strategy. These costs were incurred as a result of:

- (a) Overtime pay for additional BLRS officers brought into the special enforcement project; and
- (b) Equipment, such as additional rental cars, burner phones, and radios.⁶⁹⁷

621. Indeed, it was the uncontroverted evidence of Tania McCumber that a “simple” investigation of an Uber driver would typically involve 8 to 10 hours of staff time, and that when all personnel and equipment-related expenses are factored in, the approximate total cost to the City of a single, simple investigation of an Uber driver was between \$18,000 and \$20,000.⁶⁹⁸

622. It was the further uncontroverted evidence of Ms. McCumber that approximately 80% of investigations could be classified as “simple,” but that the remaining 20% were complex, and could take

⁶⁹⁵ *Ibid*, at p. 29, lines 21-23.

⁶⁹⁶ *Ibid*, at p. 30, lines 12-22.

⁶⁹⁷ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 46, line 19 – p. 48, line 20.

⁶⁹⁸ *Ibid*, at p. 50, lines 20 – 29.

upwards of 90 to 100 hours. Complex investigations included those in which the individual charged could not be located, or was not the registered owner of the vehicle.⁶⁹⁹

623. The plaintiffs claim that the City charged 149 “bandit cab operators” between October 2014 and when the 2016 By-law came into force.⁷⁰⁰ This not accurate.

624. In examination in chief, Ms. McCumber authenticated the most accurate accounting of charges levied by the City against unlicensed taxi drivers, which was marked as Exhibit 174.⁷⁰¹ Her authentication and evidence regarding this document was not meaningfully challenged. Exhibit 174 indicates that between October 4, 2014 and the end of 2016, the City issued a total of 230 Part I offences, and 43 Part III Summons (which generally contained 2 charges per summons), against 189 people, related to operation of an unlicensed taxicab.

625. The total numbers of charges issued and individuals charged compares favourably with Toronto, notwithstanding that: (1) the population of Toronto is more than three times that of Ottawa; (2) Toronto was estimated to have 13 times as many Uber drivers in October 2015 as Ottawa;⁷⁰² and (3) Toronto issued charges over a longer time span than Ottawa:

Jurisdiction	Ottawa ⁷⁰³	Toronto ⁷⁰⁴
Time span	October 1, 2014 – 2016 (29 months)	2012-October 1, 2015 (33 months)
Number of charges (Part III counted as 1 charge)	273	208
Number of charges (Part III Summons counted as 2 charges)	316	208

⁶⁹⁹ *Ibid*, at p. 49, line 23 – p. 50, line 7.

⁷⁰⁰ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 258.

⁷⁰¹ Exhibit 174, Unlicensed Taxi Charges, B-16010; Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 35, line 23 – 38, line 20.

⁷⁰² Exhibit 44, *supra* note 191, at p. F3057

⁷⁰³ Exhibit 174, *supra* note 701.

⁷⁰⁴ Exhibit 112, *supra* note 187, at p. F2991.

Number of individuals charged	189	104
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626. The comparison with Toronto is a far more appropriate comparison than the plaintiffs' suggested comparison with Triangle Investigation.⁷⁰⁵ Triangle is a private entity, and was retained by Mr. Way specifically for the purpose of investigating Uber. It is not a municipality that had to balance enforcement against Uber with pre-existing enforcement demands and the need to maintain continuity of service. It is not an appropriate comparator.

627. The plaintiffs also claim that "there is a strong inference that the number of individuals charged is equal to the number of undercover rides taken."⁷⁰⁶ Again, this is contradicted by the evidence. It was the uncontroverted evidence of Mr. Powers that not all investigations led to charges being issued, due to either jurisdictional issues or an inability to locate and serve the individual being charged.⁷⁰⁷

628. Even a rough and very conservative accounting of these enforcement efforts clearly demonstrates that the City spent unprecedented amounts in its efforts to enforce the 2012 By-law against Uber:

Number of investigations Oct. 1, 2014 – 2016 (does not account for investigations not leading to charges)	Estimated minimum cost per investigation (does not account for complex investigations)	Total estimated minimum cost (very conservative estimate)
189	\$18,000	\$3,402,000

⁷⁰⁵ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 261.

⁷⁰⁶ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 261.

⁷⁰⁷ Christopher Powers, Examination in Chief, February 13, 2023, *supra* note 537, at p. 39, line 16 – p. 40, line 9.

629. By way of comparison, it was Mr. Way's evidence that during the apparent heyday of cooperation between the taxi industry and BLRS, prior to 2014, that the City spent \$10,000 total on an advertising campaign warning the public against taking bandit cabs.⁷⁰⁸

630. The plaintiffs have led no evidence that could establish a standard of care against which to judge the strategy or success of the City's enforcement efforts against Uber, or evaluate its deployment of resources. Nonetheless, the evidence demonstrates that the City's conduct was clearly reasonable.

631. The City's enforcement efforts against Uber were constrained by the City's pre-existing by-law enforcement responsibilities, and the need to balance continuity of service with enforcement against the new and emerging phenomenon of Uber. The allocation of scarce enforcement resources clearly falls within the day-to-day expertise and discretion of the City, and therefore attracts a high degree of deference that should not be interfered with lightly by a reviewing Court.⁷⁰⁹

632. Despite these constraints, the City deployed unprecedented human and financial resources in support of its enforcement efforts. BLRS continually enforced the 2012 By-law against Uber drivers between the beginning of Uber's operations and the coming into force of the 2016 By-law, deploying approximately 25% of available enforcement officers across the entire City to do so. BLRS expended unprecedented sums in these efforts, spending, at an absolute minimum, approximately 300 times more than had been spent on previous awareness campaigns about bandit cabs.

633. Similarly, while the issue of tactics employed by BLRS clearly falls within the realm of day-to-day expertise deserving of deference, the evidence demonstrates that BLRS continually adapted and updated its tactics to combat the unprecedented challenges posed by Uber's "grey ball" software. Ultimately, the City achieved a high degree of success in comparison to the City of Toronto, the only

⁷⁰⁸ Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 132, line 22 – p. 133, line 2.

⁷⁰⁹ *Donnell*, *supra* note 629, at [para. 31](#).

Canadian municipality to previously deal with the emergence of Uber, and therefore the only appropriate comparator.

634. The plaintiffs have led no evidence to establish the applicable standard of care regarding enforcement against Uber drivers, and thus cannot support the claim that the City did not meet that standard.⁷¹⁰ Indeed, in their submissions, the plaintiffs fail to articulate what the standard of care should be. However, in cross-examination, Mr. Way took the position that “anything short of outright banning or eradicating Uber in the City of Ottawa constituted a failure to enforce.”⁷¹¹ This standard of perfection is plainly untenable, and is inconsistent with the jurisprudence.

635. Judged in their full context, the City’s enforcement efforts against Uber were clearly reasonable, and there is no evidentiary basis upon which to find otherwise.

(4) The City sought to overcome the statutory constraints on its enforcement powers

636. The City was constrained in its enforcement efforts against Uber by the limits of its statutory authority. As the 2016 Staff Report explained:

Currently, the enforcement mechanisms for unlicensed vehicles-for-hire and other violations of municipal taxi by-laws are provided under the Municipal Act, 2001 and the Provincial Offences Act (POA). These enforcement powers allow the issuance of charges under Part I of the POA (set fines) or Part III of the POA (summons to Court to obtain higher financial penalties), or the ability to restrain the violation upon the application of the municipality, or a taxpayer, under Section 440 of the Municipal Act, 2001

Other provincial-level enforcement powers against unlicensed taxis may be found under the Highway Traffic Act (HTA), but these are enforceable only by police officers and not by Municipal By-law Officers.⁷¹²

637. Similarly, by-law enforcement officers are not able to levy charges related to inadequate insurance under the *Compulsory Automobile Insurance Act*.⁷¹³

⁷¹⁰ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 256.

⁷¹¹ Marc André Way, Cross-Examination, January 11, 2023, *supra* note 328, at p. 152, lines 22-25; p. 155, lines 1-23.

⁷¹² Exhibit 59, *supra* note 103, at p. F2849.

⁷¹³ Marc André Way, Cross-Examination, January 11, 2023, *supra* note 328, at p. 88, lines 23-31.

638. Faced with the entry of Uber into Ottawa, the City sought to overcome these constraints by: (1) petitioning the Province for legislative amendments that would give by-law enforcement officers greater authority to enforce the *Highway Traffic Act* against unlicensed taxis; and (2) requesting assistance from the Ottawa Police Service.

639. The City's efforts to secure legislative amendments began as early as 2012. On August 5, 2012, Ms. Jones wrote to Bob Chiarelli, the Ontario Minister of Transportation, enclosing and requesting support for a draft legislative amendment to section 39.1 of the *Highway Traffic Act*. The draft amendment was sent "further to your earlier telephone conference with Councillor Mark Taylor and staff from the City of Ottawa." The letter goes on to explain that the proposed amendments would amend the *Highway Traffic Act* to: (1) permit its enforcement by by-law enforcement officers against persons operating unlicensed taxicabs; and (2) permit police officers to seize and impound vehicles believed to be operating as unlicensed taxicabs.⁷¹⁴

640. On November 12, 2012 Ottawa Councillor Mark Taylor, at that time the Chair of CPSC, reiterated Ms. Jones' request in a letter wrote to MPP Yasir Naqvi.⁷¹⁵ Members of the taxi industry, including Mr. Way, were involved in these lobbying efforts.⁷¹⁶ The City's efforts culminated in the introduction of the *Protecting Passenger Safety Act 2014*, in the Ontario Legislative Assembly, in April of 2014.⁷¹⁷ However, this bill was ultimately never enacted.⁷¹⁸

641. The City's lobbying to secure legislative amendments continued after Uber began operating. In 2015, Ms. Jones once again reached out to the Province seeking amendments to the *Highway Traffic Act*, including by holding a meeting with the Deputy Minister of Transportation, Carol Layton.⁷¹⁹ Indeed, the 2016 Staff Report recommended that these efforts continue. It stated:

⁷¹⁴ Exhibit 25, Letter from Susan Jones to Bob Chiarelli, August 2, 2012, p. A697.

⁷¹⁵ Exhibit 27, Letter from Mark Taylor to Yasir Naqvi, November 14, 2012, p. A-709.

⁷¹⁶ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 85.

⁷¹⁷ Exhibit 38, Letter from Susan Jones to Chief Bordeleau, July 7, 2015, p. F110.

⁷¹⁸ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 84.

⁷¹⁹ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 101.

Staff is therefore recommending that the City ask the province to amend the Highway Traffic Act to create enhanced enforcement powers under the HTA and in relation to municipal vehicle-for-hire by-laws, for both Municipal and Provincial enforcement staff, related to unauthorized/unlicensed vehicles-for-hire, including the ability to tie/trigger outstanding violations to plate denial, which is more realistically implementable by, and less onerous for, municipalities. This would be an expansion of current license plate denial processes in place for unpaid parking fines, and would be added for unpaid POA fines for offences such as unlicensed operation of vehicles for hire, either under the HTA (s. 39.1) or a municipal by-law —Taxi By-law or other vehicle-for-hire by-laws, such as a PTC by-law.⁷²⁰

642. Council adopted the 2016 Staff Report on April 13, 2016. In fulfillment of this recommendation, on May 4, 2016, the City's Clerk and Solicitor, Rick O'Connor, wrote to the Ontario Minister of Transportation, requesting that he consider amendments to the *Highway Traffic Act* that would, amongst other things: (1) impose greater penalties for the operation of unlicensed taxicabs; and (2) allow for the enforcement of those provisions of the Act by by-law enforcement officers.⁷²¹

643. Despite the City's continual lobbying efforts, the Province has never enacted the requested amendments to the *Highway Traffic Act*. As such, by-law enforcement officers have only been able to issue charges against unlicensed taxi drivers under the *Provincial Offences Act*. However, the City's persistent efforts to secure legislative amendments that would expand the enforcement authority of its by-law officers is further evidence of the City's reasonable conduct in its enforcement campaign against Uber.

644. The City also sought to overcome the statutory constraints on its enforcement powers by enlisting the assistance of the Ottawa Police Service, who are permitted to issue charges under both the *Highway Traffic Act* and the *Compulsory Automobile Insurance Act*. On July 7, 2015, Ms. Jones wrote to Chief Bordeleau of the Ottawa Police Service, stating, in part:

...Under the existing regulations, the number of unlicensed taxicabs has increased since Uber began operation in Ottawa in October 2014. A total of 74 charges against 36 individual UberX drivers have been laid. To date, 31 drivers have pleaded guilty to 62 charges with fines totalling over \$18,000.00. These charges are under the City of Ottawa's

⁷²⁰ Exhibit 59, *supra* note 103, at p. F2849.

⁷²¹ Exhibit 40, Letter from Rick O'Connor to Steven Del Duca, p. B-1-6012.

Taxi By-law for offences related to unlicensed taxi drivers (\$615 fine) and the operation of unlicensed taxicabs (\$260 fine).

In addition to the above noted charges laid to date by by-law officers under the Taxi By-law, and in consultation with Mayor Watson, the Police Services Board Chair Eli-El Chantiry and Community and Protective Services Chair Diane Deans, I am writing to seek your assistance and request that the Ottawa Police Service begin proactive enforcement actions to help combat illegal taxis within the existing provisions of the Highway Traffic Act (HTA) as it pertains to unlicensed taxicab operators.

With your support, the City of Ottawa has been seeking to amend the HTA to provide additional enforcement tools with respect to unlicensed taxi operations; As you are likely aware this past April a Private Member's Bill, The Protecting Passenger Safety Act 2014 (Bill 53), passed second reading in the Ontario Legislature and has been referred to committee...

Notwithstanding the possibility of forthcoming changes to the Act, at this time we are requesting your assistance to increase the City's current enforcement activities with the more stringent provisions found within the HTA, such as picking up a passenger for compensation without an appropriate license.

By-law and Regulatory Services would be pleased to work jointly with the Ottawa Police Service in support of this endeavour.⁷²² [*emphasis added*]

645. This letter is yet further evidence that the City sought all available avenues to overcome the statutory constraints on its enforcement powers, and to maximize the resources that were available to enforce against Uber. It is yet further evidence of the reasonableness of the City's conduct.

(5) The decision to not enforce against Uber as an entity or pursue injunctive relief was reasonable

646. The plaintiffs further allege that the City acted unreasonably in failing to bring charges or seek injunctive relief against any of the entities affiliated with Uber for dispatching taxicabs without a licence.⁷²³ Once again, they have led no evidence that would allow this Court to establish the standard of care that would be expected of a reasonable municipality under the circumstances. For this reason alone, the Court may dismiss this alleged ground of unreasonableness.

647. Nonetheless, the explanation for the City's decision is simple. It was a reasonable exercise of the City's discretion, informed by the decision of Justice Dunphy in *Toronto v. Uber*.

⁷²² Exhibit 38, *supra* note 717, at p. F110.

⁷²³ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 268.

648. Uber began operating in Ottawa at the beginning of October, 2014. Six weeks later, Toronto filed its injunction application on November 18, 2014, after two years of enforcing only against Uber drivers. An email sent that day from the City's Clerk and Solicitor, Rick O'Connor, to members of Council explains the rationale for the City's decision not to follow suit, and not to issue charges against Uber:

1. Why isn't Ottawa following Toronto in seeking an injunction against UBER?

The City of Toronto has taken steps against UBER as continued violations of its Taxi By-law have been ongoing since 2012. Tickets issued in that City's Provincial Offences Court have apparently taken a prolonged period of time to be scheduled and deterrence levels have not been achieved.

In Ottawa, UBER has been operating only since September and tickets have been issued against violators. Contested tickets will soon be scheduled before the Provincial Offences Court. Generally speaking, Ottawa's scheduling for trials is considered to be one of the fastest in the province. Accordingly, Ottawa might not experience the prolonged proceedings that Toronto has. In addition, the enforcement approach is to proceed by tickets as it is considered to be the most efficient and cost-effective ways of enforcing by-laws. Defendants have the option of paying tickets out of court and therefore the costs and resources associated with legal proceedings is greatly diminished. Out-of-court ticket payments can nevertheless serve to deter continued violations. The City previously deterred unlicensed or "bandit" taxis through this approach.

2. Why hasn't UBER been ticketed?

If violations of the City's Taxi By-law are not deterred, the progressive enforcement approach will include assessing and pursuing appropriate enforcement options including ticketing and/or injunctive proceedings against UBER.⁷²⁴ [*emphasis added*]

649. The City's decision to not immediately follow the lead of Toronto and issue an injunction against Uber was the type of discretionary enforcement decision that is entitled to considerable deference. Given that Uber had only been operating in Ottawa for six weeks, it was entirely reasonable for the City to pursue the faster and more cost-efficient enforcement strategy of ticketing drivers. Indeed, this was the strategy pursued by Toronto for two years before it brought its injunction application.

650. Once Toronto's application was filed, it was obvious that it would have implications for Ottawa's by-law enforcement, given the similarity in definitions between the two by-laws. Toronto's application alleged that Uber was illegally operating as either an unlicensed taxicab broker, or an unlicensed

⁷²⁴ Exhibit 198, *supra* note 669, at p. F439.

limousine service company, in contravention of Chapter 545 of the *Toronto Municipal Code*. The relevant definitions of these terms, in comparison to Ottawa’s definition of taxicab broker, are as follows:

Taxicab Broker, c. 545 ⁷²⁵	Limousine Service Company, c. 545 ⁷²⁶	Taxicab Broker, By-law 2012-258 ⁷²⁷
[a]ny person who <u>accepts requests in any manner</u> for taxicabs used for hire.	[a]ny person or entity which <u>accepts calls in any manner</u> for booking, arranging or providing limousine transportation	a person who <u>accepts calls in any manner</u> for the dispatch of taxicabs and which taxicabs are not owned by that person or that person's immediate family or employer

651. The City elected to wait for the outcome of the Toronto injunction before determining whether it would take steps against Uber as an entity.⁷²⁸ In light of the obvious similarities between the two by-laws, it is simply not credible to suggest that it was unreasonable for the City to do so.

652. Justice Dunphy’s decision in *Toronto v. Uber* was released on July 3, 2015, and had clear and obvious implications for the City of Ottawa.

653. After an extensive analysis of the manner in which a passenger uses Uber’s Rider App to call a ride, and of the interplay between the Rider app, Driver app, and Uber’s corporate structure, Justice Dunphy found that none of the Uber entities “accept” a request within the meaning of the Code. He held that:

I find that the word "accepts" as used in c. 545 of the Code requires the intervention of some element of human discretion or judgment in the process and cannot be applied to a merely passive, mechanical role of receiving and relaying electronic messages. The fact that technology has evolved to the point where mechanical switches can be as "smart" and efficient as human operators once were does not alter the meaning of the language employed.⁷²⁹

⁷²⁵ *Toronto v. Uber*, *supra* note 634, at [para. 24](#);

⁷²⁶ *Ibid.*

⁷²⁷ Exhibit 2, Tab 306, *supra* note 16, at p. F3902.

⁷²⁸ Susan Jones, Cross-Examination, February 9, 2023, *supra* note 401, at p. 126.

⁷²⁹ *Ibid* at para. 78.

654. He also found that the definition of “calls” within the meaning of the *Code* referred to phone calls, or, at the very least, required active human participation, as opposed to the automatic relaying of information over the internet that occurs through the use of the Uber apps. Justice Dunphy wrote that:

I would interpret "calls" in the limousine service company definition as referencing phone calls. At the very least, the phrase suggests to me a medium of communication with an active participant at the receiving end (such as a dispatcher or telephone service) as opposed to a purely automatic relaying or switching function as is the case with data transmitted from the Rider App.

It follows that the purely automatic, algorithm-driven process of an automatic server directing packets of data containing electronic "requests" over the Internet from the rider's smartphone to drivers who may wish to accept them cannot be characterized as a "call". The ordinary meaning of "call" simply cannot extend as far as the City would seek to extend it. An automatic data relay does not receive a call on any but the most strained of interpretations.⁷³⁰

655. Justice Dunphy summed up his findings as follows:

[103] The only function in the Uber business structure (viewed broadly) that the City has been able to point to in its argument as coming close to the concept of "accepts calls in any manner for booking, arranging or providing limousine transportation" is that of relaying the message sent from the prospective passenger to the prospective driver. There is simply no evidence before me that any of the Uber companies who are respondents have any role in that relay function. The owner of the Uber App (Uber Technologies Inc.) is not before me; neither the owner nor operator of the servers in Northern California were identified.

[104] While the City made much in argument of its "walk like a duck" metaphor, the simple fact of the matter is that it does not require ducks to be licensed. None of the ancillary aspects of Uber's business -- recruiting drivers, marketing, billing, customer relations and the like -- is subject to a requirement to obtain a license. Accepting calls for transportation does require a license and Uber does not do that.

(iv) Conclusion re limousine service company

[105] Accordingly, I find that requests for limousines (as defined in c. 545 of the Code) made by individuals in Toronto through the use of the Uber Rider App are neither "accepted" by Uber nor are they "calls" as those terms are used in the definition of limousine service company in c. 545 of the Code. Uber is not carrying on the business of a limousine service company requiring the application for a license pursuant to art. II of c. 545 of the Code.

(c) Does Uber operate a taxicab broker business?

[106] Given my findings regarding the definition of "taxicab", it is clear that the definition of "taxicab broker" is only relevant to Uber Taxi and Uber Access (a small part of the

⁷³⁰ *Ibid* at paras. 101-102.

overall Uber business in Toronto). While it is true that the "taxicab broker" definition was updated somewhat in 2014 with the change from "calls in any manner" to "requests in any manner", the change was not sufficient to alter my conclusion.

[107] The lack of any role of the Uber respondents in "accepting" any request for taxicabs is dispositive. The balance of my reasons in relation to "limousine service company" apply equally to taxicab brokers. There is no evidence that any of the Uber respondents is operating a taxicab broker business.⁷³¹ [*emphasis added*]

656. The implications of this decision for the City were obvious. The definition of taxicab broker in the 2012 By-law relies on both the term "accepts" and the term "calls." In *Toronto v. Uber*, Justice Dunphy found that the manner in which Uber's apps operate do not satisfy the definition of either term.

657. Justice Dunphy's explanation of why Uber's apps do not "accept" "calls" accords with the evidence of Ms. McCumber, given during cross-examination:

Q. Okay. And if we tie that back to dispatching, dispatching is the act or service of sending or directing a car that seats six passengers or less for the purpose of being hired.

A. Yes.

Q. Right? Okay. And based on this definition, I think you would agree with me that when Uber started operating in Ottawa, it was dispatching, right?

A. No.

Q. But we agreed before that Uber was transporting people. Uber was, was sending cars to people to be moved from one place to another.

A. They're providing the service, yes.

Q. And isn't that dispatching?

A. No.

Q. It's not?

A. No.

Q. On what basis?

A. Dispatching refers to actually directing or instructing someone to, to that passenger to take it from point A to point B.

Q. It refers to sending somebody?

A. And Uber did not.

Q. How, how did it not?

A. The application did.

Q. But the same thing.

A. No, it's not. It's not an individual that's sending someone to take that ride.

⁷³¹ *Ibid* at paras. 103-107.

Q. Right?

A. It's actually in a computer application.

Q. Oh, so you mean in the sense that it's an object?

A. It's a, a electronic-based application in which someone requests a ride. And then it's up to the individual driver on whether or not they accept that ride. There's no dispatching to a specific individual. It's leaving it open for any individual to take that.

Q. Right. But so let's break that down a little bit. The — am I understanding you correctly that, is that because Uber is an app in the sense that it, it's software, it's not a person. That's, that's....

A. For the sending of transportation on a call.

Q. Right.

A. It's not an individual that's actually sending the call.

Q. Okay.

A. To somebody.⁷³² [*emphasis added*]

658. Ms. McCumber's evidence also accords with that of Mr. Powers, who stated the following in cross-examination:

Q. Okay. So when you would hail a ride from Uber, you would call the Uber from your phone? From the phone that was given to you by by-law services?

A. No. So the way it works is you open the application. You then through the app, you punch in your address, and then you punch in your destination, and then you would then confirm the details, and then you'd be notified that whatever driver was on route to pick you up within ETA, which is what that screenshot is pretty much the next screenshot after you confirm your details. But there's no physical means to call the driver.⁷³³

659. As Ms. Jones explained, this decision gave the City reason to doubt that it could successfully obtain a conviction or an injunction against any of the entities affiliated with Uber for operating as an unlicensed taxicab broker:

MR. BURKE: Q. Now did your view change over time with respect to whether or not they were a unlicensed broker?

A. It did. It did.

Q. And why did that view change over time?

A. Well, certainly, it was their argument that they they were relating whether they were doing it publicly, or I can't recall if at the meeting that they were a, a piece of technology, it was simply a ride sharing app by way in which one could secure, secure a ride and that

⁷³² Cross-examination of Tania McCumber, February 7, 2023, *supra* note 518, at pp. 96-98.

⁷³³ Cross-examination of Christopher Powers, February 13, 2023, *supra* note 537, at p. 48, lines 2-12.

they didn't follow in that regard. It further was validated. We knew the City of Toronto, who I was speaking to frequently — Tracy Cook was the executive director of licensing there — they, of course, have been dealing with Uber for approximately two years earlier than Ottawa were. They had laid charges against drivers and they had laid a charge against Uber, I believe three companies associated with Uber for being a unlicensed broker. That matter went before the courts and was addressed before the courts and certainly the decision that came out of there gave question as to whether we could lay charges under our by-law and get a conviction.

Q. And did the approach in Toronto or the decision in Toronto inform the City of Ottawa's position?

A. It, it certainly, it certainly helped Ottawa and it certainly clarified the fact that work had to be done and in fact, policy clarified through counsel by way, by way of by-law to capture what, what it was.

Q. And did the city ultimately elect not to pursue an injunction against any of the corporate entities affiliated with Uber?

A. Well, first of all, and I've, I've spoken in the past, before an injunction we lay charges when we get a repeat activity and then we'll seek injunctive relief. So we had been not to the position where we were laying charges for being an unlicensed broker, and we had concerns of our ability to convict in that way. So there wouldn't have been rationale at that point to begin to seek an injunction.⁷³⁴ [*emphasis added*]

660. Similarly, Ms. McCumber explained her understanding that Uber's activities do not constitute dispatching as follows:

Q. So you're making a distinction between the app itself and the company?

A. Yes.

Q. Isn't the company the app?

A. No.

Q. It's not? Okay. That's, that's, that's, that's, that's interesting. It's — so anybody who creates an app can direct people to go pick somebody else and drive them and they would not be dispatching? You would need — I think what you're saying is you need an actual human being saying, you know, so-and-so driver go pick up so-and-so person?

A. For dispatching, yes.

Q. For dispatching. Okay. And that interpretation, how did you come to it?

A. Based on the definition.

Q. Okay. What in the definition tells you that an app would not qualify?

A. Because it speaks to the act or service of sending or directing a taxi cab to a person or persons who've requested.

Q. Sorry? I could not hear you, so I'm going to ask you to....

⁷³⁴ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 96-97.

A. Sorry. It speaks to the act or service of sending or directing a taxi cab to a person or persons who's requested the taxi cab.

Q. Right. And I'm asking you, what part of that says to you that an app would not be included in this?

A. Because they're not sending or directing. What they're doing, what the application does is it provides information out there kind of sitting on a screen, and it's up to an individual on whether or not they accept that ride. There's no one directing or indicating to them they must take that ride.⁷³⁵ [emphasis added]

661. The logic of Ms. Jones and Ms. McCumber's evidence is obvious from a review of Justice Dunphy's decision. The plaintiffs' reliance on the personal views of Ms. Hartig, or the alleged personal views of Diane Deans (who was not called as a witness),⁷³⁶ as to the legality of Uber do not outweigh the clear consequences of the decision for the City of Ottawa. Following the *Toronto v. Uber* ruling, the likelihood of the City successfully prosecuting any Uber-affiliated corporate entities for operating as unlicensed brokers was substantially reduced.

662. The clear implications of the *Toronto v. Uber* decision are similarly not displaced by a single line in KPMG's Final Report. The plaintiffs place a great deal of weight on the following phrase, which was included as one of the City's numerous comments on, and proposed revisions to, KPMG's draft Final Report. This phrase was ultimately included in KPMG's December 31, 2015 Final Report:

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 approach is to be taken.⁷³⁷ [emphasis added]

663. First, the plaintiffs suggest that this addition was "approved by [the City's] legal staff."⁷³⁸ This claim overstates that evidence. Ms. Hartig's evidence was that legal staff were part of the group that reviewed a document containing all of the City's proposed changes to KPMG's draft report:

Q. So just to, to reconfirm, you added this, but you don't recall specifically why or who suggested adding it, is that correct?

⁷³⁵ Cross-examination of Tania McCumber, February 7, 2023, *supra* note 518, at pp. 98-99.

⁷³⁶ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at paras. 274 and 276.

⁷³⁷ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 275; Exhibit 58, *supra* note 109, at p. F2758.

⁷³⁸ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 275.

A. Not at all. No, I don't.

Q. But it was a group effort, would you agree? Changes came in as a group effort? They're not attributed to any one person, is that correct?

A. Exactly. We reviewed it - well, in light of the time frame, we wanted to make sure everybody had an opportunity to review, and if there were any significant issues, which there were not, as you can probably tell, a lot of really editorial things, and request for clarification. Honestly - that doesn't jump out at me at all.

Q. But would it be fair to say you wouldn't have just thrown that in? You wouldn't have done it without somebody agreeing to it?

A. Well, generally, no, we - no, we wouldn't do that.

Q. Generally no. And legal was part of the group that reviewed this change?

A. Well, they were part of the group that reviewed the entire document.⁷³⁹ [emphasis added]

664. There is no evidence of any legal analysis, decision-making, or approval underpinning this specific proposed addition. As Brian Bourns confirmed, KPMG was not asked to provide, and did not seek, any legal advice in support of its Final Report, including with respect to the City's proposed revisions.⁷⁴⁰

665. Second, the proposed addition links an injunction to a contingent analysis, as the injunction would only occur "if it was determined that approach was to be taken."⁷⁴¹ Such a contingent analysis would necessarily involve an assessment of the City's chances of success, which, for the reasons set out above, were plainly and obviously diminished by the ruling in *Toronto v. Uber*. Further, the reference to a potential injunction occurs in the context of recommendations around a prospective regulatory regime, rather than a fulsome analysis of the enforceability of the 2012 By-law. Indeed, the Policy Options paper explicitly linked stronger enforcement powers to the establishment of a new licensing category for PTCs.⁷⁴²

666. Third and finally, the City knew that the Final Report would ultimately become a public document. In this context, it is logical that the City would want the Final Report to support the possibility of an

⁷³⁹ Christine Hartig, Cross-Examination, February 6, 2023, *supra* note 139, at p. 28, line 17 – p. 29, line 7.

⁷⁴⁰ Brian Bourns, Cross-Examination, February 1, 2023, *supra* note 267, at p. 97, lines 2-13.

⁷⁴¹ Exhibit 58, *supra* note 109, at p. F2758.

⁷⁴² Exhibit 56, *supra* note 67, at p. F3150.

injunction against Uber, including in the event that the Uber did not comply with the new proposed regulatory regime.

667. In any event, Uber did comply with the new regulatory regime. A report by BLRS staff to the CPSC dated November 1, 2017, which provided a one-year update regarding the 2016 By-law, found that “overall, compliance by the licensed PTCs, Uber Canada and Teslift, has been very high.” The report includes a lengthy discussion of Uber’s compliance with the 2016 By-law, and concludes that:

Access to [*the*] platform continues to be provided by Uber Canada to BLRS, in accordance with by-law requirements. Proactive field investigations with respect to PTC drivers and PTC vehicles have continued to be conducted by BLRS, resulting in a high rate of compliance with the various requirements of the by-law including: no street hailing, no acceptance of cash payment, no use of taxi stands, and proof of insurance.⁷⁴³

668. It is clear, on a balance of probabilities, that following the *Toronto v. Uber* decision, the City would have faced, at the very least, a difficult case in establishing that Uber had breached the 2012 By-law. Neither the personal views of a single witness, nor a single, out of context phrase in the Final Report displace this conclusion.

669. The plaintiffs' argument that the City should have aggressively pursued legal action against Uber, despite a Court decision that obviously diminished the likelihood of success, is unfounded and unreasonable. The standard of care they seek to establish, which is unsupported by any evidence, would require the City to act irresponsibly by dedicating scarce resources to pursue prosecutions or litigation with little chance of success. In so doing, the City would necessarily be required to divert valuable resources from other important municipal responsibilities.

670. This is simply not a tenable position.

671. Instead, the City must balance its duties and obligations to the public with the need to allocate resources efficiently and effectively. This includes making strategic decisions about which legal actions

⁷⁴³ Exhibit 154, Memo to CPS – One Year Update – November 1, 2017, pp. B-1-8404 and B-1-8407.

to pursue and when to do so. The City is entitled to a high degree of deference in these types of discretionary enforcement decisions.⁷⁴⁴

672. In short, the City's decision not to bring proceedings against Uber as an entity was a reasonable exercise of municipal discretion, motivated by the City's assessment that success was unlikely.

673. The City's decision making in this regard in fact paralleled that of Mr. Way. Under section 440 of the *Municipal Act*, Mr. Way, or any of the plaintiffs, could have brought an injunction against Uber seeking to restrain its alleged contravention of the 2012 By-law. In cross-examination, Mr. Way acknowledged that one of the factors in the decision not to do so was an assessment that success was unlikely:

Q. All right. Now, as I understand it, Mr. Way, we've been through this a bit you believe that the City should have pursued an injunction in this case?

A. Yes.

Q. And like the taxi plate holders at Coventry Connections, the decision to do so or not to do so, as the case might be, would involve a exercise of judgment? You agree with that?

A. You're talking about whose judgment?

Q. Well, your own judgment. That in making a decision to bring an application for an injunction that involves the exercise of judgment. You have to make a decision one way or the other.

A. Yes, that's right. And I've answered that question that we chose not to do an injunction...

Q. Right.

A. ...against Uber.

Q. Right. And you'll agree with me that one of your factors in coming to that decision making was the prospect or probability of success?

A. Against Uber?

Q. Yes.

A. Yes.

Q. And, sir, I suggest to you that in your decision making that you determined that you would be unsuccessful in bringing an injunction?

A. Again, an injunction against Uber?

Q. Yes.

A. Yes.⁷⁴⁵ [*emphasis added*]

⁷⁴⁴ *Donnell*, *supra* note 629, at [para. 31](#)

⁷⁴⁵ Marc André Way, Cross-Examination, January 11, 2023, *supra* note 328, at p. 150, lines 4 – 32.

674. As Mr. Way acknowledged, likelihood of success is a reasonable factor upon which to base decision making. It is obvious from the *Toronto v. Uber* decision that success for the City in bringing a proceeding against Uber was unlikely.

675. The City's decision not to seek injunctive relief against Uber drivers was similarly reasonable. It was motivated by two reasons: First, the City does not typically seek injunctions for violation of a by-law in the absence of repeated convictions for the same offence.⁷⁴⁶

676. Second, and once again, an application for an injunction against Uber drivers in Ottawa had already been considered and refused by the Court. In *Abdullah v. Maziri*, a group of Ottawa taxi drivers, along with Unifor, sought an injunction under section 440 of the *Municipal Act* restraining the alleged contravention of the 2012 By-law by twenty Uber drivers. The Court refused the injunction.⁷⁴⁷

677. Indeed, Mr. Way was aware of this injunction application, and chose not to join it. He also elected not to bring any injunction application against Uber drivers himself, in part on the basis of his assessment of the prospect of success.⁷⁴⁸

678. The test in evaluating the City's decision not to seek injunctive relief or bring proceedings against Uber as an entity is not whether the City was absolutely correct in doing so, or whether this would have been a best practice. Rather, it is whether, in light of the deference due to municipalities, the decision was reasonable and a good faith exercise of discretion. The plaintiffs have led no evidence that it was not, and the evidence is clear that it was.

⁷⁴⁶ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 96-97.

⁷⁴⁷ *Abdullah v. Maziri*, 2016 ONSC 2168.

⁷⁴⁸ Marc André Way, Cross-Examination, January 11, 2023, *supra* note 328, at p. 148, line 11 – p. 150, line 31.

3) The City did not cause the Plaintiffs' damages

679. The plaintiffs' argument that the City caused their damages posits a hypothetical scenario in which the City was able to somehow prevent Uber's operations in Ottawa between October 1, 2014 and September 30, 2016. This possibility was always remote – a fact that Mr. Way recognized.

680. On October 22, 2015, Coventry Connections provided a detailed submission to KPMG, as part of the VFH Review.⁷⁴⁹ Mr. Way was involved in the development of this document.⁷⁵⁰ The document makes the following assertions about Uber's "modus operandi when illegally entering a new market":

- In most cases, they have been known to ignore all requests from councillors, mayors and regulators to acquire the necessary permits, etc., or have ignored requests they not operate until council and regulators have examined the situation.
- Cities are generally unprepared to deal with this type of law-breaking, and enforcement attempts are made. But Uber encourages its drivers to flout the law by covering fines while their public relations staff actively use and encourage social media activists to demand the Uber service.
- Then Uber begins to drop prices to attract passengers as they use price point to attract riders. The rates have dropped to nearly half in many well-established markets and continue to do so in most markets.
- Once services like Uber get entrenched, it is difficult to reverse the change. City authorities in places like Toronto and Calgary are now stating how difficult it is to enforce the law and that they may have created a safe haven for these illegal operators.⁷⁵¹

681. In cross-examination, Mr. Way agreed with all these assertions.⁷⁵² Given that these assertions are reflective of the plaintiffs' view of Uber, and given the City of Toronto's lack of success in obtaining injunctive relief against Uber, it is difficult to see how the City of Ottawa could have prevented Uber's entry into the Ottawa market. Indeed, Mr. Way agreed that it was "quite possible" that Uber "would gain entry into the market."⁷⁵³

⁷⁴⁹ Exhibit 24, *supra* note 228, at p. F132.

⁷⁵⁰ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 43, line 30 – p. 44 line 7.

⁷⁵¹ Exhibit 24, *supra* note 228, at p. F143-144.

⁷⁵² Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 46, line 15 – p. 49, line 5.

⁷⁵³ Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, at p. 51, lines 15-18.

682. To this end, it was the uncontroverted evidence of Mr. Bourns that the Canadian jurisdictions effectively able to prevent the entry of Uber were those where the province had jurisdiction over the taxi industry. In cross-examination, Mr. Bourns gave the following evidence:

Q. And you would agree with me that other jurisdictions were able to effectively enforce against Uber?

A. Yes. And what we noted was that it was really provincial jurisdictions. You know, Montréal has — is impacted by provincial policy and direction on — in terms of licensing taxicabs. So the, the areas where the province was — had the jurisdiction, seemed to be the ones where there was effective control on Uber.

Q. And, and, and those are the jurisdictions in which the provinces asserted regulatory authority over the taxi industry. Correct?

A. Yes.

Q. Yeah. And in Ontario, the municipalities have asserted jurisdiction or regulation of the taxi industry. Correct?

A. They're given that jurisdiction by provincial legislation. Yes.⁷⁵⁴ [*emphasis added*]

683. In his re-examination, Mr. Bourns clarified that evidence as follows:

Q. All right. Taking you to the final report at F2757, this is part of Exhibit 58. Again, Mr. Conway took you to the last paragraph on that page and he asked you about other jurisdictions that were able to effectively enforce against Uber and you told him that the areas where the province had jurisdiction were the ones that were able to effectively enforce against Uber. And can you just clarify why you highlighted the role of the province in enforcement?

A. Well, the province has constitutional authority to establish the rules of operation and the rules of regulation of this industry and any other and provinces were able to establish punishments, I guess, for breaches of their requirements that were effective and of more concern, I guess, to Uber and able to eliminate it's operation. In the other provinces the provinces had established some rules that municipalities had to operate within and in the case of Ontario, which Ottawa fell within, those rules were somewhat restrictive in terms of what — how they could enforce the rules and what the implications might be.⁷⁵⁵

684. One example of the type of restriction referred to by Mr. Bourns is that the City's by-law enforcement officers could only issue charges under the *Provincial Offences Act*. They could not issue charges under the *Highway Traffic Act*, which allows for both a broader range of charges and much

⁷⁵⁴ Brian Bourns, Cross-Examination, February 1, 2023, *supra* note 267, at p. 98, lines 10-26.

⁷⁵⁵ Brian Bourns, Re-Examination, February 2, 2023, *supra* note 266, at p. 72, lines 8-26.

higher fines. The City repeatedly sought amendments to the *Highway Traffic Act* that would enable broader enforcement powers for its officers, but these were never granted.⁷⁵⁶

685. Uber's demonstrated conduct in flouting municipal by-laws, and the limitations on the City's ability to combat that conduct, suggest that the City did not cause the plaintiffs' damages. Rather, to the extent that the plaintiffs suffered damages (which the City denies), those damages were, on a balance of probabilities, inevitable from the moment that Uber decided to expand into Ottawa.

⁷⁵⁶ Marc André Way, Cross-Examination, January 11 2023, *supra* note 328, at p. 88, lines 13-22.

COMMON ISSUE 3: Did the City's conduct in allegedly negligently enforcing the Taxi By-law 2012-258 or in amending the Taxi By-law in 2016 infringe on the right of the Taxi Plate Holders under section 15 of the *Charter of Rights and Freedoms* or under section 3 of the *Human Rights Code*?

1) Overview of the defendant's position on the discrimination issue

686. The members of the plaintiff class are speculative investors. Membership in the class is premised upon the acquisition of a taxi plate license. These were issued by the City and exchanged amongst industry participants for increasing sums of money. Class members acquired one or more plate licences anticipating that they would be able either to transfer them to someone else for more money later or to rent out use of the license as a stream of income.

687. The plaintiffs are claiming that the City – by its actions in regulating the VFH industry – has injured their anticipated gains and/or revenue stream from these taxi plate licences. In the portion of their claim that is based on section 15(1) of the *Charter*, the plaintiffs argue that since the majority of plate holders identify with a number of visible minority groups, any injury to the financial interests of these racialized plate holders is an infringement of the equality rights of the entire class.

688. The plaintiffs claim that this discrimination comes from two sources of regulatory action: (1) the City's allegedly negligent enforcement of the 2012 By-law; or (2) the City's enactment of the 2017 By-law. Of course, if the Court rules that the City was not negligent in its enforcement of the 2012 By-law, then the plaintiffs' discrimination claim is narrowed and the impugned regulatory action is limited to the enactment of the 2016 By-law.

689. The plaintiffs' *Charter* claim rests on the following premise:

- (a) Certain demographic groups are economically disadvantaged when compared to the general population;

- (b) Members of the plaintiff class of plate holders fall within a number of these demographic groups, including three groups (Arabic, Black,⁷⁵⁷ and South Asian) that statistically tend to be economically disadvantaged when compared to other groups (White and Asian, in particular);
- (c) By affecting the perceived value of taxi plate licences, the City's regulatory action has treated the plate holder class members differently from the general population;
- (d) This differential treatment has exacerbated or perpetuated the disadvantage experienced by the Arabic, Black, and South Asian populations to which some of the class members belong.

690. In framing their *Charter* claim in this way, the plaintiffs depart from the jurisprudence on section 15(1) and posit a novel test for substantive equality that would result in a breach of section 15(1) any time a government action affects members of these three visible minority groups. In this way, the plaintiffs – who, on all economic metrics (such as annual income, home ownership, etc.), are *not* disadvantaged – are attempting to shield their industry from regulation and preserve the value of their speculative investment by cloaking the entire plate holder class in the disadvantage experienced by certain groups of visible minorities in the broader population. As a result, the plaintiffs are asking this Court to declare the City's 2016 By-law unconstitutional, a declaration which – given the composition of the taxi industry across Canada – would have wide-reaching implications.

691. The plaintiffs' premise is wrong in law and the plaintiffs' *Charter* argument must fail.

⁷⁵⁷ The plaintiffs claim that the percentage of plate holders who identify as Black is “significantly higher than their respective population in the Ottawa-Gatineau Census Metropolitan Area and Ontario” (Plaintiffs' Closing Submissions, dated April 6, 2023 at para. 317). This is incorrect. Both Dr. Ornstein and Dr. Galabuzi confirmed that the percentage of Black plate holders is the same as the general population. See Exhibit 77, Expert Report of Dr. Michael Ornstein Report, dated September 4, 2019, p. 8; Grace-Edward Galabuzi, examination in chief, February, 15,, 2023, p.26, lines15-24.

692. The City's actions in regulating the VFH industry make no distinctions based on personal characteristics such as racialization or immigration status. Rather, the City's regulatory action results in distinctions between those industry participants who hold taxi plate licences and those who do not.

693. The plaintiff class is made up of a variety of demographic groups, each of which is equally affected by the City's regulatory action. The representative plaintiff, Mr. Way, holds the single largest number of taxi plate licences and he is not a visible minority or an immigrant. Moreover, a number of plates are held by corporations which, by definition, have no personal characteristics. In fact, 25% of the issued plates are held by 1% of plate holders. The majority of these multi-plate holders are either White or corporate entities.⁷⁵⁸ The plaintiffs have not adduced evidence to suggest that any particular group within the class of plate holders has been disproportionately affected by the City's regulatory action.

694. On the proper formulation of the section 15(1) test from the case law, the effects of the City's regulatory action must be assessed by comparing the condition of the claimants (the taxi plate license holders) with the condition of others in the social and political setting in which the question arises.⁷⁵⁹ This "social and political setting" means the VFH industry in Ottawa, and not the general population, as the plaintiffs argue.

695. The correct legal inquiry is to examine whether the impugned regulatory action affects any class of VFH industry participant differently from any other class of VFH industry participant on the basis of an enumerated or analogous ground. The case law requires this inquiry to consider the "full context of the claimant group's situation" and the "actual impact of the law on that situation."⁷⁶⁰

⁷⁵⁸ Exhibit 95, List of plate owner class members sorted by last name; see, for example 87 plates held by Mr. Way, 70 held by Mr. Szirtes, 63 held by Coventry Connections, 25 held by Ms. Serman, etc.

⁷⁵⁹ *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), at p. 164 [Andrews]; cited in *R. v. Sharma*, 2022 SCC 39 at para. 31 [Sharma]; cited in Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 368

⁷⁶⁰ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 42 [Fraser], cited in Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 291

696. As set out in the case law, this full inquiry requires a comparison of the *actual impact of the law* on members of the claimant class to the *actual impact of the law* on others in the social and political setting in which the question arises. If – after this full inquiry – a differential impact is found, the inquiry moves to whether that difference is based on an enumerated or analogous ground. Only after the requirements of the first step of the legal test have been met does the inquiry move on to the second step, that is, to determine whether the differential effect that is based on a protected ground results in stereotyping or the exacerbation or perpetuation of historical disadvantage.

697. Evidence about the claimant group’s situation, on its own, may amount to merely a “web of instinct” if too far removed from the situation in the actual workplace, community or institution subject to the discrimination claim.⁷⁶¹

2) The plaintiffs rely on a “web of instinct”

698. By ignoring the social and political setting in which the equality claim arises – including the full context of the class members’ situation and the actual impact of the law on the class members as compared to others in the same workplace – the plaintiffs have failed to lead evidence capable of satisfying the two-step test for discrimination. Moreover, the plaintiffs’ reliance on a web of instinct leads them to ignore the actual evidence that was before the Court – evidence that is fatal to their *Charter* claim. This evidence, which is set out in detail below, shows:

- (a) The City’s regulatory action affected a wide variety of stakeholders, including other participants in the VFH industry;
- (b) The participants in the VFH industry who do not hold a taxi plate license (i.e. PTC drivers, and 75% of taxi drivers) enjoy a benefit from the City’s regulatory action in the form of additional employment options and increased bargaining power;

⁷⁶¹ *Fraser*, *supra* note 760, at [para. 60](#).

- (c) These industry participants who did not invest in a taxi plate license share the same general demographic profile as the taxi plate license holders – that is, taxi drivers and PTC drivers are also predominantly racialized people and immigrants and typically fall within the same visible minority groups identified by the plaintiffs;
- (d) Notwithstanding the disadvantage experienced by visible minorities on average in Canadian society as a whole, the members of the plaintiff class are not economically disadvantaged, and any economic outcome experienced by the class members as a result of the City’s regulatory action is a result of their choice to invest in a taxi plate license, not their membership in any particular demographic group; and
- (e) The choice of class members to invest in a taxi plate licence was not inextricably linked to their personal characteristics. Class members invested in taxi plates as speculative assets, often motivated by quotidian desires for flexible working hours or better work/life balance, and assessments of the earning potential of the asset that were unsupported by due diligence.

699. By obscuring the evidence about the full industry environment in which the plaintiffs’ claim arises, the plaintiffs simply spin a web of instinct designed to ensnare the Court in half-formed assumptions about disadvantage and vulnerability.

700. Instead of adducing evidence that would satisfy the requirements of the test established in the case law, the plaintiffs have relied on the generalized disadvantage experienced by visible minorities in Canadian society and urged the Court to sympathize with the circumstances of the SPH who gave testimony at trial. The plaintiffs have painted these SPHs as vulnerable and unsophisticated, suggesting that they were simply borne along by the prevailing societal currents into taxi plate ownership.

701. In reality, the plate holder class members control access to the taxi industry in Ottawa, and this gives them significant market power. Plate holders – and especially multi-plate holders like Mr. Way –

are able to dictate the conditions of employment for taxi drivers. Mr. Way's evidence spoke to the various rents and fees charged by plate holders and brokers to taxi drivers for access to the market.⁷⁶² Indeed, it is this access to passive income through rents charged to drivers that attracted the SPHs to make their investment.⁷⁶³

702. Each of the SPHs who testified at trial explained that they acquired their plate license as an investment.⁷⁶⁴ They share this motivation with Mr. Way, who is neither racialized nor an immigrant. As a result of the entry of PTC services into the market, the market power of the taxi industry has waned and all taxi plate holders – regardless of ethnic or demographic group – have experienced the result of that change in the market. Indeed, as the holder of the most plates (by a wide margin), Mr. Way has likely felt the most impact.

703. It is important to note that the taxi plate license holders are only one facet of a complex industry. Taxicabs need a driver to generate revenue. These drivers must pay rent or lease a plate from a plate holder to access the market. Moreover, since the introduction of PTCs in 2014, the Ottawa VFH market also includes PTC drivers. As will be detailed below, all participants in the VFH industry were affected by the City's regulatory action with respect to PTCs. Importantly, taxi drivers and PTC drivers enjoyed a benefit in the form of increased market power and flexibility as a result of the City's regulatory action. Accordingly, the Court's section 15(1) inquiry must take all market participants into account since they form the full "social and political setting in which the question arises."

⁷⁶² Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 94, lines 17 – 19, p. 95, lines 7 – 32 to p. 98, lines 1 – 13, p. 99, lines 13 – 24, p. 100, lines 27 to 32 to p. 105, lines 1 – 16; Marc André Way, Cross-Examination, January 12, 2023, *supra* note 31, at p. 1, lines 30 – 32 to p. 4, lines 1 – 20, 28 – 32, p. 7, lines 9 – 32 to p. 26, lines 1 – 30.

⁷⁶³ Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 40, lines 26 – 32 to p. 41, lines 1 – 18; see also Ziad Mezher, Examination in Chief, January 17, 2023, *supra* note 596, at p. 126, lines 17 – 32 to p. 127, lines 1 – 28; Iskhak Mail, Cross-Examination, January 19, 2023, *supra* note 26, at p. 25, lines 30 – 32 to p. 27, lines 1 – 23; Antoine El-Feghaly, Examination in Chief, January 25, 2023, *supra* note 26, at p. 90, lines 15 – 29.

⁷⁶⁴ Ziad Mezher, Examination in Chief, January 18, 2023, *supra* note 26, at p. 5, lines 2 – 18; Iskhak Mail, Cross-Examination, January 19, 2023, *supra* note 26, at p. 50, lines 3 – 8, p. 51, lines 15 – 32 to p. 52, lines 1 – 11; Antoine El-Feghaly, Examination in Chief, January 25, 2023, *supra* note 26, at p. 88, lines 23 – 30; Yeshitla Dadi, Cross-Examination, January 23, 2023, *supra* note 26, at p. 121, lines 17 – 26.

704. The following submissions will show that the plaintiffs have failed to satisfy the legal test for establishing an infringement of section 15(1) of the *Charter*.

3) The plaintiffs have failed to establish a *prima facie* infringement of section 15(1)

705. The test to establish an infringement of the equality right guaranteed by section 15(1) of the *Charter* is the same regardless of whether the claimant alleges direct or adverse impact discrimination. In order to establish a *prima facie* infringement of section 15(1), the plaintiffs must prove that the City's regulatory action (either the enforcement of the 2012 By-law or the enactment of the 2016 By-law):

- (a) Creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
- (b) Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.⁷⁶⁵

706. The burden is on the claimant to satisfy both branches of this test. If the claimant does not meet this burden, then the claim must fail.⁷⁶⁶

707. While there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally different questions. As such, the analysis at each step must remain distinct from the other.⁷⁶⁷

708. This two-step test is the means by which the *Charter's* "animating norm" of "substantive equality" is protected. The Court's focus must ultimately be directed to this test, and assess the evidence in the record to determine whether the test has been met. Where the claimant fails to meet the burden at either

⁷⁶⁵ *Sharma*, *supra* note 759, at [para 28](#) ; citing: *R. v. C.P.*, [2021 SCC 19](#), at [paras 56](#) and [141.](#); *Fraser*, *supra* note 760, at [para 27](#); and *Kahkewistahaw First Nation v. Taypotat*, [2015 SCC 30](#) at [paras 19-20](#) [*Taypotat*].

⁷⁶⁶ *Sharma*, *supra* note 759, at [para 36](#).

⁷⁶⁷ *Ibid* at [para 30](#).

step of the test, there is no infringement of section 15(1), and therefore no substantively unequal outcome.⁷⁶⁸

709. In order to satisfy step one of the test, the plaintiffs must demonstrate a disproportionate impact on a protected group, as compared to non-group members. The key concept at this stage of the test is disproportionate impact. All laws are expected to impact individuals, so merely showing that a law impacts a protected group is insufficient to meet this stage of the test.⁷⁶⁹ The evidence must show that the law – on its face or in its impact – creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds screens out those claims “having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context.”⁷⁷⁰

710. The plaintiffs are claiming that the City’s regulatory action has “demolished” the value of all taxi plate licences, not just those held by racialized or immigrant individuals.⁷⁷¹ However, the plaintiffs have not led evidence about how the value of each plate holder’s plate has changed and they have not led evidence to establish that there is any difference in how plate value changes across demographic groups. Indeed, the plaintiffs have not pled that plate value changes differ based on any personal characteristics of the plate holder. So, it appears that the plaintiffs are not basing their discrimination claim on differences in the effect of the City’s regulatory action on plate values.

711. The plaintiffs go on to claim that the members of the plaintiff class who fall within three visible minority groups, namely Arab, Black, and South Asian,⁷⁷² have suffered disproportionate disadvantage simply by virtue of their membership in these groups. In support, the plaintiffs offer statistical data

⁷⁶⁸ *Ibid* at para 38.

⁷⁶⁹ *Ibid* at para. 40

⁷⁷⁰ *Taypotat*, *supra* note 765, at para. 19

⁷⁷¹ Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p.121 lines 3-5; Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 394

⁷⁷² It is important to note that there are actually more White plate holders than Black plate holders. Dr. Ornstein’s evidence was that 10% of plate holders are White and only 6% are Black (Ornstein Report, Exhibit 77, *supra* note 757, p. B-15776)

derived from the census that shows, on average, that members of these visible minority groups are economically disadvantaged when compared to other groups.

712. In essence, the plaintiffs' evidence in support of their *Charter* claim simply establishes that, when measured as the average of the population as a whole, a pre-existing gap exists between certain visible minority groups and the majority population. This principle is not controversial, but it does not assist the Court with the section 15(1) analysis in this case. The case law is clear that "leaving a gap between a protected group and non-group members unaffected does not infringe s. 15(1)."⁷⁷³

713. In *Symes*, the Supreme Court emphasized the need to show a causal link between the impugned law and the claimed adverse effect discrimination:

If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.⁷⁷⁴

714. By obscuring the full context of the claimant group's situation and ignoring the actual impact of the law on that situation, the plaintiffs have failed to show that the effects of the City's regulatory action have discriminated against the plaintiffs. Instead, the plaintiffs have pointed to pre-existing social circumstances and are asking the Court to assume that the City's actions have a discriminatory effect that has not been proven.

4) Threshold evidentiary requirement: the Court must consider the full context of the claimant group's situation

715. In support of their argument on discrimination, the plaintiffs assert that some members of the plaintiff class experience economic disadvantage by virtue of being drawn from one of three visible minority groups: Arabic, South Asian, and Black.⁷⁷⁵ The plaintiffs do not assert that class members who fall outside these groups experience disadvantage.

⁷⁷³ *Sharma*, *supra* note 759, at para 40.;

⁷⁷⁴ *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 SCR 695, at p. 765

⁷⁷⁵ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 287.

716. The plaintiffs argue that the plate holder class members “face disadvantage” because they are “drawn from racialized and immigrant groups who face a systemic disadvantage in Canadian society.”⁷⁷⁶ The fact that certain groups face systemic disadvantage is not controversial. It is also not disputed that several class members identify with a number of visible minority groups.

717. However, simple membership in a particular visible minority group is not sufficient to establish discrimination as a result of the City’s regulatory action. The case law is clear that substantive equality requires attention to the *full context* of the claimant group’s situation.⁷⁷⁷ Apart from recounting the personal stories of the journey to Canada for four of the class members, the plaintiffs have failed to lead evidence of the context of the claimant group’s situation as it pertains to their specific discrimination claim and the regulatory action at issue.

718. Instead, the plaintiffs have provided general demographic statistics about broad groups of visible minorities. In particular, the plaintiffs have provided statistical average income figures for a number of demographic groups derived from the Canadian census. The plaintiffs have not led evidence that would allow the Court to determine whether the incomes of the class members fall within these averages. This is an intentional choice by the plaintiffs, who took the position repeatedly at trial that evidence about the actual incomes or assets of the members of the plaintiff class is “quite beside the point.”⁷⁷⁸

719. Instead, the plaintiffs simply ask the Court to assume that since visible minorities tend to be economically disadvantaged in Canada, the plaintiff class members are therefore disadvantaged. Under the test established by the jurisprudence, actual circumstances of the plaintiff class members are directly relevant to the legal test for discrimination. This test requires the plaintiffs to establish that the City’s regulatory action has caused them to suffer disadvantage when compared to other groups. Without

⁷⁷⁶ *ibid*

⁷⁷⁷ *Fraser*, *supra* note 760, at [para. 42](#)

⁷⁷⁸ Yeshitla Dadi, cross examination, January 23, 2023, *supra* note 26, p. 136, lines 8-16.

evidence about the plaintiff class' circumstances before and after the City's regulatory action, this comparison is impossible.

A) The plaintiffs' statistical evidence is too broad to be meaningful

720. Central to the plaintiffs' argument is their claim that members of the plate holder class are drawn from demographic groups that have experienced historical disadvantage in Canadian society. The plaintiffs argue that membership in a visible minority group is proof of individual disadvantage.

721. Statistical data can be helpful in establishing a discrimination claim only if the evidence reveals "clear and consistent statistical disparities in how a law affects a claimant's group."⁷⁷⁹ The key here is that the evidence must point to how the law at issue actually affects members of the claimant group. In this case, the plaintiffs have advanced two types of statistical data, neither of which speaks to the effect of the City's regulatory action on the claimant group. These two types of statistical data are:

- (a) broad census data about the economic conditions of various visible minority groups within the general population,⁷⁸⁰ and
- (b) microcosmic data about certain demographic characteristics of taxi plate license holders in Ottawa.⁷⁸¹

722. The plaintiffs' expert witness on discrimination, Dr. Michael Ornstein, confirmed that these two sources of data are not correlated and his report did not attempt to draw any relationship between these two sources.⁷⁸² Nevertheless, the plaintiffs conflate these two sources of data and assert that plate holders who belong to certain demographic groups are themselves "disadvantaged individuals"⁷⁸³ simply by virtue of membership within that group. The plaintiffs do not address the fact that census data represents an average across an entire demographic group and that individual members within that

⁷⁷⁹ *Fraser*, *supra* note 760, at [para. 63](#)

⁷⁸⁰ Exhibit 77, *supra* note 757, Tables 4 and 5, p. A839 and A841.

⁷⁸¹ Exhibit 77, *supra* note 757, Tables 2 and 3, p. A832 and A834.

⁷⁸² Michael Ornstein, Cross-Examination, January 24, 2023, p. 12, lines 1 – 32 to p.13, lines 1 – 15, p. 22, lines 29 – 32 to p. 23, lines 1 – 14.

⁷⁸³ Plaintiffs Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 404.

group can be found above and below that average. The plaintiffs simply ask the Court to infer that if a class member falls within one of the identified groups, he must be disadvantaged as compared to the general population.

723. In doing so, the plaintiffs fall into the logical fallacy of "division." This logical fallacy occurs when one assumes that what is true of the whole must also be true of the individual parts. It is a logical fallacy to make assumptions about individuals based solely on their membership in a larger group.

724. Dr. Ornstein's report focused entirely on the economic circumstances of broad demographic groups as described by the statistical data gathered through the national census. Dr. Ornstein analyzed data from the 2016 Canadian Census, which covers 25% of all Canadian households and provides broad statistical data on economic family income across various demographic groups within Canada. These groups will obviously include many individuals who do not work in the taxi industry.

725. Dr. Ornstein confirmed that he examined census data about various visible minority groups (as those groups are defined in the census) and reported only on the average income data for those groups.

Q. And then what I would consider to be your second task - and you, you mentioned it as your second task here in this first paragraph, was once you had identified the specific visible minority groups that feature in the class of plate holders, you then looked at these groups more broadly and assessed the economic well-being of these groups as a whole. Is that an accurate description?

A. Yes.

Q. And in order to do that, you relied on general census data. Is that right?

A. In census data, the term "general" is not usually applied to it.

Q. Okay. So it's data from the census.

A. Yes.

Q. And we'll, we'll get into this term a little more detail later on. But briefly, when you say the term, "economic well-being", would that include factors like income level, wealth, employment quality, things like that?

A. Only income.

Q. Only - so sorry, maybe I'm not being clear. You considered only income in your report. Is that right?

A. That's correct.⁷⁸⁴

726. Dr. Ornstein did not present any data on the incomes of plate holders. This was confirmed by the City's expert witness on discrimination, Dr. Grace-Edward Galabuzi:

MR. ESTABROOKS: Q. Okay. So the question, I think, Mr. Galabuzi [sic], was if we were to place — if we wanted to do an analysis that places taxi plate holders in Ottawa within these income deciles, what information would we need?

A. We'd need the income information.

Q. And as far as you're aware from reviewing Dr. Ornstein's report, is that information contained in his report?

A. It's not available.⁷⁸⁵

727. Similarly, Dr. Galabuzi confirmed that Dr. Ornstein's data did not speak to any economic disadvantage experienced by plate holders.

MR. ESTABROOKS: Q. And I think we've discussed this already, but just can you confirm, what does the data in tables four and five in Dr. Ornstein's report tell us about any economic disadvantage experienced by taxi plate holders?

A. It tells us about the economic disadvantage experienced by the groups from which they come, but not the plate owners themselves.⁷⁸⁶

728. This limitation alone renders Dr. Ornstein's data insufficient to conduct the analysis required by the section 15(1) test. In order to conduct an apples-to-apples comparison, the Court must have access to comparable numbers from both the statistical data and the claimant class. This is impossible because the plaintiffs have not adduced any evidence about the income levels of the claimant class. As a result, the Court is left to compare annual income data from the Census on the one hand, to speculative data on plate values on the other. It is impossible to make any meaningful comparison on the basis of these different metrics. Dr. Ornstein did not consider data about class members' income or any other metric of economic well-being:

⁷⁸⁴ Michael Ornstein, Cross-Examination, January 24, 2023, *supra* note 782, p.12, lines 2-23

⁷⁸⁵ Grace-Edwards Galabuzi, examination in chief, February 16, 2023, February 16, 2023, p.36 lines 8-15

⁷⁸⁶ *Ibid*, at p.37 line 30 and p. 38 line 4

Q. And when you looked at this income data, you relied exclusively on the census, and am I right in understanding that you did not look, specifically, at the income of the Ottawa plate holders?

A. Yes.

Q. You didn't look at any income tax returns from the plate holders?

A. No.

Q. And that's not something you were asked to do. Is it?

A. It was not something I was asked to do.⁷⁸⁷

729. The plaintiffs only produced one document that speaks to class members' income levels – Mr. Mail's 2013 tax return⁷⁸⁸ – and the survey conducted by the Leger Group did not include information about the incomes of survey respondents, even though it could have.⁷⁸⁹

730. Without this evidence, the Court cannot make a meaningful assessment of the economic well-being of the members of the plaintiff class. The only evidence before the Court deals with average annual incomes of broad demographic groups. Attempting to determine the economic well-being of any individual or group of individuals from the plaintiff class while relying on broad, statistical averages is akin to attempting to predict the weather in Ottawa based on North American climate data.

B) Sociological data that does not address the claimants' actual circumstances is not helpful in the discrimination analysis

731. In order to assist the Court in a section 15(1) discrimination analysis, sociological data must speak to the actual circumstances of the claimant group and the likely effect of the impugned regulatory action on that claimant group. It is not sufficient to simply point to sociological data on broad demographic trends.

732. In their cross-examination of Dr. Galabuzi, the plaintiffs referred to a decision of the Federal Court of Appeal⁷⁹⁰ where the Court explained that the generalized demographic data that Dr. Galabuzi

⁷⁸⁷ Michael Ornstein, cross examination, January 24, 2023, *supra* note 782, at p.13 line 5-15

⁷⁸⁸ Exhibit 76, Iskhak Mail T1 2013 – Redacted, F666

⁷⁸⁹ Christian Bourque, cross examination, January 25, 2023, p. 61 lines 1-16

⁷⁹⁰ *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181 [*Begum*]

presented to the Court was not sufficient to decide the particular section 15(1) question which was before the Court, namely, whether the minimum necessary income (MNI) requirement in Canada's immigration regime disproportionately affected racialized applicants.

733. In *Begum*, the Immigration Appeal Division (IAD) had dismissed a claim that the MNI requirement infringed the claimant's rights under section 15(1). The IAD determined that the evidence advanced by the claimant was insufficient to enable the Court to identify a defined group that could be compared to the claimant group, or demonstrate the actual impact of the impugned regulatory requirement. The IAD concluded that the claimant had not established a causal connection between the impugned provision and a disproportionate or adverse effect on the claimant herself.⁷⁹¹

734. On appeal, the Federal Court of Appeal explained that, while the sociological evidence provided illustrated income disparities along gender and racial lines, it did not establish that the MNI requirement denied the claimant a benefit that others receive. The Federal Court of Appeal rejected Dr. Galabuzi's evidence because it rested on inferences and assumptions:

[67] He returned to that theme in the concluding paragraph of his affidavit, where he stated:

In conclusion, there is a definite differential impact on the ability of Canadian citizens and permanent residents to sponsor their family members by applying the minimum necessary income requirement because of the racial and gender inequalities in the Canadian labour market and the differential access to the income structure. Given the racialized and gendered differentials in employment, income employment patterns and low income status, and given that these differentials are due to structural and systemic factors beyond the individuals' control, the economic disparity experienced by racialized groups and women will persist and are unlikely to change in the near future. As a group, members of racialized communities will continue to be over-represented among the low income group. As such, they will likely to be disproportionately affected by the minimum necessary income requirement for family class sponsorship.

(Appeal book, at page 740.)

[68] The main problem with Professor Galabuzi's assertion that racialized groups and women are disproportionately impacted by the MNI, however, is that it rests on inferences and assumptions. As noted by the IAD, Professor Galabuzi has not researched sponsorship MNI approval and refusal rates or trends. There is also no discussion in his affidavit (let alone data evidence) supporting his claim that women, racialized communities

⁷⁹¹ *Begum*, *Ibid* at [para. 23](#)

and people with disabilities are, as a result of the MNI requirement, treated differently from others when attempting to sponsor parents or grandparents. Indeed, Professor Galabuzi conceded on cross-examination that the last sentence of paragraph 43 of his affidavit (appeal book, at page 740) is speculative.

[69] Although Professor Galabuzi's evidence demonstrates income disparities along gender and racial lines, I agree with the IAD and the Federal Court that none of it relates precisely to the impact of the MNI requirement. Professor Galabuzi does not rely on studies in this respect, but rather draws an inference from his knowledge and from other studies regarding the limited access to labour market that he transposed to the MNI requirement. It was not unreasonable to conclude that this kind of evidence falls short of establishing that the appellant and people who share her characteristics are denied a particular benefit that others receive. It also happens to be contradicted by more relevant and specific evidence pertaining to approval and refusal rates, which will be addressed later in these reasons.⁷⁹² [*emphasis added*]

735. In this case, the same criticisms apply to Dr. Ornstein's evidence. None of Dr. Ornstein's evidence relates precisely to the City's regulatory action with respect to PTC services. Instead, Dr. Ornstein draws inferences from broad census data about the impact of the City's actions on the plaintiff class. Dr. Ornstein's evidence falls short of establishing that the plaintiff class members suffer a disadvantage that others do not as a result of the City's regulatory actions. Dr. Ornstein has not researched the impact of the City's regulatory action on plate holders and he has not provided any evidence to support the claim that plate holders are treated differently as a result of the City's actions.

C) The plaintiffs' criticism of Dr. Galabuzi's evidence is misplaced

736. The plaintiffs assert that Dr. Galabuzi is not qualified to comment on statistical methods.⁷⁹³ Dr. Galabuzi has a degree in economics.⁷⁹⁴ His academic research involves analyzing the same type of census data tendered in evidence in this case.⁷⁹⁵ It is simply inaccurate to state that Dr. Galabuzi lacks knowledge of statistical analysis.

737. The plaintiffs' criticism of Dr. Galabuzi's evidence stems chiefly from their failure to appreciate the difference between statistical averages and data about specific groups. As set out above, the questions at issue in this case require consideration of sociological data about Ottawa taxi plate license

⁷⁹² *Begum, Ibid* at paras. 67-69

⁷⁹³ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 410

⁷⁹⁴ Exhibit 229, Updated CV of Dr. Grace-Edward Galabuzi, p. B-1-5894

⁷⁹⁵ Grace-Edward Galabuzi, examination in chief, February 15, 2023, *supra* note 757, p. 5 line 31 to page 6 line

holders. Broad statistical data about visible minority groups simply does not provide the level of detail required for this purpose. Dr. Galabuzi's academic research into labour market conditions is more broad-based than the particular inquiry in this trial, and therefore it is appropriate to rely on statistical averages from larger populations. In cross-examination, Dr. Galabuzi confirmed the different purpose behind his labour market research:

Q. I see. But in your own work with Sheila Block, you compare racialized groups to non-racialized groups, similar to what Dr. Ornstein did, correct?

A. Yes. Yes.

Q. Okay.

A. For, for, for, for the particular purpose of describing and establishing disparity in experience in the labour market.⁷⁹⁶

738. Statistical research requires selecting the set of statistical data that is appropriate for the particular question that the research is intended to answer. For example, a study of employment levels in Ontario would not use national labour statistics. In this case, the relevant question deals with the VFH industry in Ottawa. It is not inconsistent for Dr. Galabuzi to use data about the labour market in general for his research into that subject while at the same time criticizing Dr. Ornstein for failing to focus on the particular data relevant to this context.

739. The plaintiffs' second criticism of Dr. Galabuzi is that he simply critiques the evidence provided by Dr. Ornstein and does not offer any evidence of his own. Of course, this is not surprising: Dr. Galabuzi is an expert witness for the Defendant; it is not his role to create the record. The case is the plaintiffs' to prove. If the plaintiffs had evidence to disprove Dr. Galabuzi's supposition that taxi drivers and PTC drivers were likely composed of the same visible minority groups as the taxi plate license holders, the plaintiffs bear the onus of leading that evidence.

⁷⁹⁶ Grace-Edward Galabuzi, cross examination, February 16, 2023, *supra* note 501, p. 46 lines 22-29

740. Finally, the plaintiffs make the confusing suggestion at footnote 701 that Dr. Galabuzi was incorrect when he claimed that the Li Xu article speaks about the taxi industry in Ottawa. The Li Xu article clearly covers Ottawa at Table 8.⁷⁹⁷

D) The plate holders are not economically disadvantaged

741. Nothing in the plaintiffs' evidence connects Dr. Ornstein's broad demographic survey to the actual circumstances of the plaintiff plate holders. The plaintiffs assert that many of the plate holders fall within disadvantaged visible minority groups. Simple membership within a given visible minority group is not a proxy for actual disadvantage. Within any demographic group, there is wide variation among individual group members. By definition, some members fall above the average and others fall below it. Moreover, the plaintiffs ignore the fact that a significant number of the taxi plate licences are held by either corporate entities or people who are not racialized or immigrants.

742. On the evidence before the Court, there is nothing to suggest that any of the actual plate holders are disadvantaged. On the contrary, the evidence advanced at trial points in the opposite direction. In particular:

- (a) Both the multi-plate holders and the SPHs are relatively economically *advantaged*; and
- (b) Each of the individual plate holders admitted that they made the business decision to acquire their plate as a speculative investment.

743. The plaintiffs failed to adduce any evidence about the actual economic circumstances of any of the class members.

744. Dr. Ornstein's statistical data considers the economic wellbeing of demographic groups within the general population, but it does not speak to the economic wellbeing of the plate holder class

⁷⁹⁷ Exhibit 89, Article by Li Xu - Who Drives a Taxi, March 2012, Table 8, B-1-7652

members or any other segment of the Ottawa VFH industry.⁷⁹⁸ Moreover, Dr. Ornstein confirmed that the Census only measures income levels; it does not measure wealth.⁷⁹⁹

745. Dr. Ornstein's analysis did not cover a number of potential economic indicators within the industry. For example, Dr. Ornstein agreed that:

- (a) He was incorrect to state that taxi drivers are not unionized in Ottawa.⁸⁰⁰
- (b) He did not consider contributions made by taxi plate holders into the Canada Pension Plan.⁸⁰¹
- (c) He did not conduct any analysis on why a person would choose to buy a taxi plate instead of buying a home.⁸⁰²
- (d) He did not look into the prices of taxi plates in this proceeding.⁸⁰³

746. The plaintiffs were asked to provide documents by which the incomes of the SPH witnesses could be measured, but the plaintiffs failed to do so.⁸⁰⁴ One class member – Mr. Mail – provided a tax return as part of the discovery process. This tax return shows that in 2013, Mr. Mail's net household income (including his wife's income) was \$90,139.15.⁸⁰⁵ According to the census data reviewed by Dr. Ornstein, this places Mr. Mail in between the sixth and seventh income deciles for 2013.⁸⁰⁶ Dr. Ornstein described these deciles as roughly representing the upper end of the "middle class".⁸⁰⁷ Based on the direct evidence in the record, it is clear that Mr. Mail is not economically disadvantaged.

⁷⁹⁸ Michael Ornstein, Cross-Examination, January 24, 2023, *supra* note 782, p. 10, lines 14 – 32 to p. 14, line 1.

⁷⁹⁹ Michael Ornstein, Cross-Examination, January 24, 2023, *supra* note 782, p. 23 lines 6-14

⁸⁰⁰ Michael Ornstein, Cross-Examination, January 24, 2023, *supra* note 782, p. 86 lines 10-24

⁸⁰¹ Michael Ornstein, Cross-Examination, January 24, 2023, *supra* note 782, p. 86 lines 25 to p.87 line 4

⁸⁰² Michael Ornstein, Cross-Examination, January 24, 2023, *supra* note 782, p. 87 lines 8-17

⁸⁰³ Michael Ornstein, Cross-Examination, January 24, 2023, *supra* note 782, p. 87 line 26 to p.88 line 3

⁸⁰⁴ Exhibit N, Letter from Matthew Estabrooks to Marion Sandilands, dated January 2, 2023; see e.g. Ziad Mezher, Cross-Examination, *supra* note 26, at p. 59, lines 23 – 32 to p. 61, lines 1 – 23.

⁸⁰⁵ Exhibit 76, *supra* note 788, F666

⁸⁰⁶ Exhibit 88 – Statistics Canada Average Income Deciles, p. 2 (B-1-7570); note that \$90,139.15 in 2013 dollars is equivalent to \$100,187.21 in 2020 constant dollars, which is the unit of measure in Exhibit 88

⁸⁰⁷ Exhibit 77, *supra* note 743, at Tables 4 & 5, p. A839 and A841.

747. Absent direct evidence of the remaining class members' economic wellbeing, the Court can look to indirect evidence of economic wellbeing from the testimony of the class members themselves. This evidence shows that the plate holders who testified at trial all enjoy relative economic advantage. For example, each of the SPHs who testified owns his family home.⁸⁰⁸ Dr. Ornstein agreed that homeownership is a measure of economic inclusion.⁸⁰⁹

748. Other indicators of the plate holders' relative economic advantage are as follows:

- (a) Each of the single plate holders lives in a single-family, suburban home on a plot of land.⁸¹⁰ Mr. El-Feghaly's home has an in-ground pool.⁸¹¹ Mr. Mail and Mr. Dadi have paid off their mortgage⁸¹² and Mr. Mezher confirmed that he is nearly mortgage-free.⁸¹³
- (b) Mr. Dadi purchased a house on Montmere Avenue. in Orleans in 2007 for approximately \$264,000. Mr. Dadi paid a 77% down payment on that property.⁸¹⁴ Mr. Dadi testified that he borrowed against this property to acquire his taxi plate license, but he paid off the loan in just three years when he sold his house on Montmere Avenue.⁸¹⁵ Mr. Dadi then purchased a new house on Antigonish Avenue in Orleans in 2011 for approximately

⁸⁰⁸ Ziad Mezher, Examination in Chief, January 18, 2023, *supra* note 26, p. 27, lines 18 – 19; Antoine El-Feghaly, Cross-Examination, January 25, 2023, *supra* note 26, p. 111, lines 15 – 24; Yeshitla Dadi, Cross-Examination, January 23, 2023, *supra* note 26, p. 135, lines 10 – 32 to p. 145, lines 1 – 3.

⁸⁰⁹ Exhibit 91, *Measuring Economic Exclusion*, Naomi Lightman & Luann Good Gingrich (2018) at p. 8 (B-1-7784); Michael Ornstein, cross examination, January 24, 2023, *supra* note 782, p. 76, lines 5-19

⁸¹⁰ Exhibits 67, google street view and aerial views - 2122 Gardenway drive, B-1-6915; Exhibit 82, Photo 1931 Montmere Ave, B-1-7341; Exhibit 85, Photo 355 Antigonish, B-1-7373; Exhibit 99, Photos of 1430 Maxime St., B-1-7922

⁸¹¹ Antoine El-Feghaly, cross examination, January 25, 2023, *supra* note 26, at p. 112 lines 13-16

⁸¹² Iskhak Mail, cross examination, January 19, 2023, *supra* note 26, at p.52 lines 12-32; Yeshitla Dadi, examination in chief, January 23, 2023, *supra* note 26, at p. 144 line 24 to p. 146 line 26.; Exhibit 85, *supra* note 810

⁸¹³ Ziad Mezher, cross examination, January 18, 2023, *supra* note 26, p. 70 lines 10-12. Note that Mr. Mezher's evidence is not consistent on this point. In cross-examination he said he was within one to two years of paying off his mortgage. In direct examination (January 18, 2023, p. 27 line10-27 p.25) he said he hoped to be mortgage free in five years.

⁸¹⁴ Yeshitla Dadi, cross examination, January 23, 2023, *supra* note 26, at p. 135 line 15- to p.139 line 24; Exhibits 82, *supra* note 810; Exhibit 83, Parcel Register 1931 Montmere Ave., B-1-7338

⁸¹⁵ Yeshitla Dadi, cross examination, January 23, 2023, *supra* note 26, at p. 144 lines15-23; Exhibit 84, Charge for 1931 Montmere Ave., p. B-1-7329

\$364,000. Mr. Dadi paid this mortgage in full nine years later. By February 2020, Mr. Dadi owned the house on Antigonish Avenue. outright without encumbrances.⁸¹⁶

- (c) Dr. Ornstein confirmed that he measured economic wellbeing on the basis of “economic family income.” This measure includes income earned by parents as well as any adult children living in the family home.⁸¹⁷ Mr. El-Feghaly confirmed that all his adult children live at home and each of them has a university education and is employed in a professional capacity.⁸¹⁸ Mr. Mezher’s children also have university degrees and work as professionals.⁸¹⁹ Both Mr. Mezher and Mr. El-Feghaly confirmed that they supported their children’s education by covering the cost of their university education.⁸²⁰
- (d) In addition to driving a taxi and holding a taxi plate, Mr. El-Feghaly owns his own construction business.⁸²¹ When the plaintiffs state at paragraph 408 of their written submissions that Mr. El-Feghaly has started working in construction to supplement his income, they fail to mention that Mr. El-Feghaly is the owner of that company.

749. This evidence belies the flaws in Dr. Ornstein’s analysis and in the plaintiffs’ logic. While the broad census data shows that certain visible minority groups experience economic disadvantage on average, the evidence at trial shows that the group of taxi plate license holders experience relative economic advantage, regardless of demographic grouping.

⁸¹⁶ Yeshitla Dadi, cross examination, January 23, 2023, *supra* note 26, at p. 144 line 24 to p. 146 line 26; Exhibit 85, *supra* note 810, B-1-7373

⁸¹⁷ Michael Ornstein, Cross-Examination, January 24, 2023, *supra* note 782, at p. 33, lines 26 – 32; Exhibit 77, *supra* note 757, at pp. 13-17; see also Grace Edward Galabuzi, Examination in Chief, February 15, 2023, *supra* note 757, at p. 12, lines 21 – 32.

⁸¹⁸ Antoine El-Feghaly, Cross-Examination, January 25, 2023, *supra* note 26, at p. 111, lines 25 – 30.

⁸¹⁹ Ziad Mezher, Examination in Chief, January 18, 2023, p. 23, *supra* note 26, at lines 27 – 32 to p. 24, lines 1 – 5.

⁸²⁰ *Ibid*, at p. 24, lines 6 – 16; Ziad Mezher, Cross-Examination, January 18, 2023, *supra* note 26, at p. 30, lines 12 – 21; Antoine El-Feghaly, Examination in Chief, January 25, 2023, *supra* note 26, at p. 85, lines 30 – 32 to p. 86, lines 1 – 4, p. 90, lines 30 – 32 to p. 92, lines 1 – 4.

⁸²¹ Antoine El-Feghaly, Cross-Examination, January 25, 2023, *supra* note 26, at p. 97, lines 3 – 19.

750. Moreover, the evidence at trial establishes without a doubt that each one of the single plate holders made a conscious choice to acquire a plate license because they expected the value of plates to continue to rise and they expected to eventually earn passive income through renting the license to others. In short, each plate license holder saw the acquisition of a taxi plate license as a speculative investment and a business decision.

E) The plate holders are speculative investors who made a business decision to acquire a plate license

751. The plaintiffs' evidence is that the individuals who enter the taxi industry are largely racialized and immigrants. The plaintiffs' evidence is that the taxi industry is an attractive option for new immigrants because of its low barriers to entry.⁸²² Most of these entrants to the industry began by driving a taxi. A portion of those drivers acquired plate licences as an investment,⁸²³ leading to a concentration of racialized and immigrant individuals within the plate-holding class. This is not controversial.

752. However, the plaintiffs have not adduced any evidence to connect the decision to acquire a taxi plate license with personal characteristics such as ethnicity or immigration status. For each of the individual plate holders, the story of their journey to Canada helps to contextualize their choice to enter the taxi industry as a driver.⁸²⁴ For many newcomers to Canada, driving a taxi presents a low-barrier option to earn a living. However, immigration status does not speak to the decision to acquire a taxi plate license, which is a speculative investment that requires the outlay of significant capital.

753. Rather, the evidence shows that all taxi industry participants – regardless of ethnicity – saw taxi plate licences as a speculative asset and a way to generate passive income. The plaintiffs admit that industry participants saw acquiring a taxi plate license was “like buying property that can generate an

⁸²² Marc André Way, examination in chief, January 5, 2023, *supra* note 3, at p. 10 lines 10-20 and p. 38 lines 1-30

⁸²³ Marc André Way, examination in chief, January 5, 2023, *supra* note 3, at, p. 41 lines 1-18

⁸²⁴ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at paras. 322-366

income until it is sold for a profit in the future.”⁸²⁵ Many of the plaintiffs’ witnesses likened the investment to buying income-generating real estate.⁸²⁶

754. On cross-examination, Mr. Way agreed with the observation in the Hickling Report that taxi plate licences were akin to agricultural quotas because both types of assets represented a portion of market share in a monopoly, and both assets were “inherently risky”.⁸²⁷

755. Each of the SPHs who testified at trial explained that they were motivated to acquire a plate for two reasons: (1) it would generate passive income because it could be rented to another driver, and (2) by the time they decided to sell, the plate license would be worth more than what they paid for it.

756. Mr. Mezher saw plate acquisition as an investment:

Q. Okay. And what, what made you buy a plate?

A. Between renting and owning, I think more safe for myself to buy. And I thought about doing investment in the future, if I'm exiting this business, I can sell or rent. It will be like a, because you are self-employee, so it will be like a retirement plan to you. So when I'm doing, when I'm going out of the business, I can sell my plate, like I bought it, I can sell it, and get out of the business. That is the plan at that time.⁸²⁸ [*emphasis added*]

757. Mr. Mail sold one investment (his share of the gas station) to purchase a plate license because he thought the value would always increase:

A. After I obtain my taxi license, like I told before, so I decided to invest some money in this business since I find that it's safe and it's regulated, it's worth it. And during all experience that I have in Canada and from the other, I heard they always saying good things about taxi. Like, this business was always the prize, the value was rising, never go down. And it was getting the market, like, every day, like, popular, popularity people was talking, customers which was coming to the gas station talking good things about that. So I decided this is the right business to invest in. So I sold my share in gas station, and I purchased a lease...⁸²⁹ [*emphasis added*]

⁸²⁵ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 349

⁸²⁶ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 349; Iskhak Mail, examination in chief, January 18, 2023, *supra* note 492, at p. 117 line 31 to p. 118 line 13

⁸²⁷ Marc André Way, cross examination, January 10, 2023, *supra* note 30, at p. 123 lines 1-26

⁸²⁸ Ziad Mezher, cross examination, January 18, 2023, *supra* note 26, at p. 5 lines9-18; note that Mr. Mezher paid \$50,000 for his plate licence using money he received as a no-interest loan from his brother in law and he paid the loan off in under 10 years (see Ziad Mezher, cross examination, January 18, 2023, *supra* note 26, at p. 9 line 17 to p.10 line 3

⁸²⁹ Iskhak Mail, examination in chief, January 18, 2023, *supra* note 492, p. 113 lines 13-25

758. Mr. El-Feghaly was clear that he saw the plate as an investment that would ensure a stream of passive income in retirement:

Q. Okay. And so you just mentioned the retirement, that you bought the plate for retirement purposes. Can you elaborate on that a little bit. What, what does that, what does that mean?

A. When you work in industry 20 years, you know it's, if it's good for you for the future or not. So after 20 years, it was a good life with a nice family and living like normal person, like, like anybody, like any citizen. And you see it's, that's good for, I have another 10, 12 years to work. I said I'd do this investment, good for me for my retirement. That's why I decided to sell the lease and buy the plate.

Q. Okay. And what would you have done in, in, in — if, if your, with the plate when, when you retire?

A. I will rent the plate to get, like, you have any property or stuff like this to get the extra money for your retirement? That will help.

Q. Okay. How about selling the plate? Was that, was that something that you also considered or no?

A. Not really, no.⁸³⁰ [*emphasis added*]

759. Mr. El-Feghaly also explained how he assumed that the value of the taxi plate licences would always increase:

Q. And just going back to this agreement here, let's go back to the agreement. You'd agree with me that this is the agreement that you made with Mr. Krayem to obtain the plate?

A. Correct.

Q. So you obtained the plate from Mr. Krayem. Correct?

A. Correct.

Q. You didn't obtain it from the City?

A. Correct.

Q. You said a little earlier that when these plates were changing hands, the price was going up. Did you expect that price to continue to go up?

A. Correct.

Q. And you based that on your previous experience watching plates change hands. Right?

⁸³⁰ Antoine El-Feghaly, examination in chief, January 25, 2023, *supra* note 26, at p. 89 lines4-22

A. Correct.

Q. No one advised you that the plates will always go up?

A. No.⁸³¹

760. Mr. Dadi borrowed against the capital in his home to raise money to acquire his plate. Mr. Dadi also borrowed money from Mr. Way for this purpose.⁸³²

761. Like the other SPHs, Mr. Dadi was assured when he acquired the plate license that it would hold its value. Like the other SPHs, Mr. Dadi expected the plate license to provide income in his retirement:

Q. Did you think it was a risk to buy the plate?

A. Well, I never - I never think a risk, but I was - I was just, I, I assured hundred percent I buy this plate for retirement. If it is a risk, I don't buy.

...

... At the end of the day, when I get – I rent this plate, I am planning to collect some money from my plate.⁸³³

762. Each of the SPHs who testified at trial, testified that their choice to acquire a plate was a financially-motivated business decision. For example, Mr. Mail sold his stake in one business (the gas station) to acquire another (the taxi plate license):

Q. Right. And in term — when did you sell your interest in the store? When did you sell your interest in the store?

A. Yeah. I sold it between 2001 or 2002.

Q. All right. And do you remember how much you got for the sale?

A. I don't remember.

Q. You don't remember how much you, you sold it for?

A. No. I don't remember exactly how much.

Q. What approximately?

A. Between 30, 35,000, something like this.

⁸³¹ *Ibid*, at p. 107 line 17 to p. 108 line 4

⁸³² Yeshitla Dadi, examination in chief, January 23, 2023, *supra* 26, at p.102 line 32 to p. 104 line 8

⁸³³ *Ibid*, at p. 105 lines 8-11, 20-24

Q. All right. Okay. And that was a business decision that you made to exit the convenience store?

A. Yeah. That was the decision I made to go to taxi business.

Q. Right. But it was a....

A. I prefer taxi business than gas station.

Q. Right. It was a business decision that you made though, to get out of the convenience store business and go into the taxi business?

A. Yes. That's right.⁸³⁴

763. It is important to note that by the time Mr. Mail acquired a taxi plate lease in 2001 or 2002, he had been in Canada for over ten years. He did not make the decision to sell the lease and acquire a taxi plate license for another ten years. At that point, Mr. Mail had been in Canada for over twenty years. This is significant because, as Dr. Galabuzi explained, immigrant precarity fades with time. As an immigrant becomes integrated into Canadian society, their economic status tends to move away from disadvantage.⁸³⁵

764. This is evident from Mr. Mail's own testimony about why he chose to enter the taxi industry. Based in his years of experience in business in Canada, he saw the taxi industry as an attractive business opportunity:

Q. Right. So you agree with me that it was your choice to go into the taxi industry?

A. That's right.

Q. And there were other options of employment. You could have gone back to the convenience store, you could have worked in a restaurant, you could have worked in a gas station, you could have worked at a technology company?

A. Yeah. From the all experience I had from these businesses before, I find the taxi business is more solid and it's more secure.

Q. Okay.

A. And it's making more money and you have a, you're going to have a time for your family, for kids, which is also very important in this country. And besides this, it's a, I was getting word from people which was coming to gas station, pumping their — taxi drivers and

⁸³⁴ Iskhak Mail, cross examination, January 19, 2023, *supra* note 26, at p. 19 lines 6-27

⁸³⁵ Grace-Edward Galabuzi, Examination in Chief, February 15, 2023, *supra* note 757, at p. 10, lines 3 – 32 to p. 12, lines 1 – 20; Exhibit 230, Expert Report of Dr. Grace-Edward Galabuzi, A930, A935 and A938.

owners, they were saying really good reference they was giving regarding the taxi business.

Q. All right.

A. That's why, that refers me to go do this, this business, taxi instead of these other ones I did. From past experience, I find that this is better business. That's why I jumped to taxi.

Q. All right. You, so you were enthused by those factors. That's why you went into the taxi industry?

A. That's right.⁸³⁶

F) Conclusion

765. The legal test to establish an infringement of section 15(1) requires the Court to consider:

- (a) The full context of the claimant group's situation;
- (b) The actual impact of the law on that situation; and
- (c) The persistent systemic disadvantages that have operated to limit the opportunities available to that group's members.

766. The plaintiffs have focused entirely on the third element and offered broad statistical data that speaks to the larger demographic groups to which some members of the plaintiff class belong. However, the plaintiffs have failed to provide any evidence to fulfil the other two evidentiary requirements.

767. The evidence in the record that speaks to the full context of the claimant group's situation shows:

- (a) The plaintiff class is not homogenous and a substantial portion of the taxi industry is controlled by non-racialized class members.
- (b) The plaintiffs have offered broad statistical data about the average condition of certain visible minority groups.

⁸³⁶ Iskhak Mail, cross examination, January 19, 2023, *supra* note 26, at p. 27 lines 27 to p. 28 line 19
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- (c) Aside from simple membership in a visible minority group, the plaintiffs have not offered any evidence to show the individual plate holder witnesses (or any other class member) experiences any actual economic disadvantage.
- (d) The evidence in the record shows that the single plate witnesses actually enjoy a measure of economic *advantage*.
- (e) Each one of the plate holders made a choice to acquire a taxi plate license as a speculative investment and a business decision.

768. The City submits that this evidence precludes a finding that the City's regulatory action at issue brought about a discriminatory effect.

5) Threshold evidentiary requirement: the court must consider the actual impact of the impugned regulatory action

769. The majority in the Supreme Court of Canada's decision in *Fraser* determined that if a claimant can show that a law or state action has a disproportionate impact on members of a protected group, then the first stage of the section 15(1) test will be met. Two types of evidence are helpful in establishing a claim of adverse impact discrimination: (1) evidence about the circumstances of the claimant group and (2) evidence about the results produced by the challenged law.⁸³⁷

770. Thus, causation is a central issue. Claimants must show that it is the impugned state action that caused (or at least contributed to) the disproportionate impact at issue. In this case, the plaintiffs must present sufficient evidence to prove that the City's regulatory action, in its impact, "creates or contributes to a disproportionate impact on the basis of a protected ground." There must be a nexus between the City's regulatory action and the discriminatory impact alleged.⁸³⁸ The focus will be on the effect of the law and the situation of the claimant group.⁸³⁹

⁸³⁷ *Fraser*, *supra* note 760, at paras. 52–56.

⁸³⁸ *Ibid* at paras 42-46.

⁸³⁹ *Ibid* at para 48.

771. In *Sharma*, the Supreme Court reiterated that causation is a central issue. That is, the claimant must show a link or a nexus between the impugned law and the discriminatory impact:

[42] As we have explained, in adverse impact cases, the law appears facially neutral. At step one, the claimant must present sufficient evidence to prove the impugned law, in its impact, creates or contributes to a disproportionate impact on the basis of a protected ground. (*Fraser*, at para. 60, citing *Taypotat*, at para. 34; *Alliance*, at para. 26; *Symes v. Canada*, [1993] 4 SCR 695, at pp. 764-65). Causation is thus a central issue. In *Withler*, the Court observed:

In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. . . . In that kind of case, the claimant will have more work to do at the first step. [para. 64]

[43] Since the Charter's adoption, "claimants have been required to demonstrate, through evidence, some sort of nexus between a particular action of the state, such as legislation, and an infringement of a Charter right or freedom."

[44] This is confirmed by a long line of s. 15 jurisprudence: the claimant must establish a link or nexus between the impugned law and the discriminatory impact. In *Symes*, the Court stressed the importance of distinguishing between adverse impacts "caused" or "contributed to" by the impugned law and those which "exist independently of" the impugned provision or the state action (p. 765). As Abella J. explained in *Taypotat*:

. . . intuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the [government] to the burden of justifying a breach of s. 15 . . ., there must be enough evidence to show a *prima facie* breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct. [para. 34]

[45] The causation requirement between the impugned law or state action and the disproportionate impact is recognized in the jurisprudence through the words "created" or "contributed to". Section 15(1) claimants must demonstrate that the impugned law or state action created or contributed to the disproportionate impact on the claimant group at step one (*Symes*, at p. 765). Both terms — "created" and "contributed to" — describe cause. "Contributed to" merely recognizes that the impugned law need not be the only or the dominant cause of the disproportionate impact.⁸⁴⁰ [*emphasis added*]

772. Claims of adverse effect discrimination should be supported by evidence about the outcomes that the impugned law or policy has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately impacted. This

⁸⁴⁰ *Sharma*, *supras* note 759, at paras. 42-45

evidence may include statistics, especially if the pool of people adversely affected by a criterion or standard includes both members of a protected group and members of more advantaged groups.⁸⁴¹

773. In this case, the plaintiffs have conceded that the statistical evidence they led at trial does not speak to the outcomes that the impugned regulatory action has produced in practice.

A) The Plaintiffs concede that the expert evidence does not address causation

774. The jurisprudence is clear that in order to make out a claim for discrimination, the claimant must prove causation. That is, the claimant must prove, with some evidence, that the state action that forms the basis of the discrimination claim actually caused or contributed to differential treatment on enumerated or analogous grounds.

775. The plaintiffs themselves agree that the expert evidence they put forward was not intended to address any disproportionate effects caused by the City's regulatory action.

776. Dr. Ornstein agreed on cross-examination that he was not asked to comment on whether any action by the City caused or contributed to the disadvantage experienced by various visible minority groups in Canadian society.⁸⁴²

777. Dr. Ornstein also conceded that he did not read the 2016 By-law, he did not know what the by-law was about in a general sense, and he did not know when the by-law was passed. Dr. Ornstein conceded that he was not asked to consider the 2016 By-law:

Q. And you're aware that the claim here, involves a by-law that's in - was enacted by the City of Ottawa. Correct?

A. I'm not very familiar with the legal nature of the claim.

Q. So I take it then, you haven't read the by-law?

A. I have not read the by-law.

Q. Okay. Do you have a general idea of what it's about?

⁸⁴¹ *Fraser*, *supra* note 760, at [paras 57-58](#)

⁸⁴² Michael Ornstein, examination in chief, January 24, 2023, *supra* note 782, at p. 15 lines 21-24

A. Not really.

Q. Do you know when it was passed?

A. No.

Q. Because this wasn't something you were asked to do. Is that right, Dr. Ornstein?

A. As, as we saw in the first paragraph, it's not something I was asked to do.⁸⁴³

778. Dr. Galabuzi confirmed that nothing in Dr. Ornstein's evidence speaks to the impact of the City's regulatory action.⁸⁴⁴

779. On cross-examination, Dr. Galabuzi agreed that Dr. Ornstein had not set out to determine whether the City's by-law amendments had a discriminatory effect:

Q. I would put to you that Dr. Ornstein does not set out to prove that the disproportionality of the effect of the amendments represents a discriminatory effect. Would you agree?

A. I concede that, yes.⁸⁴⁵

780. Similarly, counsel for the plaintiffs asked Dr. Galabuzi to confirm that Dr. Ornstein did not attribute any discriminatory effects to the actions of the City:

Q. And I would put to you that Dr. Ornstein does not attribute the source of the discriminatory impacts to the actions of the City. Would you agree?

A. Yes, I will agree.⁸⁴⁶

781. Without evidence about the actual impact of the City's regulatory action on the members of the plaintiff class, the Court does not have the evidence it needs to satisfy the test for discrimination. That is, the Court does not have evidence before it on which it can conclude that the City's regulatory action caused or contributed to a disproportionate impact on class members on the basis of an enumerated or analogous ground. Instead, the only evidence before the Court is (1) broad statistical evidence about various visible minority groups in general, and (2) evidence that points to the relative economic

⁸⁴³ Michael Ornstein, examination in chief, January 24, 2023, *supra* note 782, at p. 18 lines 13-27

⁸⁴⁴ Grace-Edward Galabuzi, Examination in Chief, February 15, 2023, *supra* note 757, at p. 33, lines 4 – 10, p. 39, lines 22 – 32 to p. 40, lines 1 – 18, p. 43, lines 16 – 28.

⁸⁴⁵ Grace-Edward Galabuzi, cross examination, February 16, 2023, *supra* note 785, at p. 42 lines 9-13

⁸⁴⁶ Grace-Edward Galabuzi, cross examination, February 16, 2023, *supra* note 785, at p. 43 lines 3-6

advantage of the individual plate holders who testified at trial. The plaintiffs are asking the Court to use the broad statistical evidence of statistical patterns within Canadian society to infer a discriminatory impact on all class members. This amounts to nothing more than the “web of instinct” that the Supreme Court cautioned against.

6) Discrimination analysis, step one: does the City’s regulatory action create a distinction?

782. The flaws and omissions in the plaintiffs’ evidence outlined above are sufficient on their own to undermine the plaintiffs’ discrimination claim. Nevertheless, the following section will set out the test for an infringement of section 15(1) as established by the case law and explain how the plaintiffs’ evidence has failed to meet both steps of the two-step test.

783. The Supreme Court confirmed that the two steps of the test for discrimination are distinct and each one requires separate analysis, which should not be collapsed into a single step:

[30] Uncertainty in the evidentiary burden in adverse impact cases has arisen when courts collapse the two steps of analysis into one, as the majority at the Court of Appeal did here (see para. 83). The two steps are not watertight compartments or “impermeable silos” (*Fraser*, at para. 82), since each step considers the impact of the impugned law on the protected group. While there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally different questions. As such, the analysis at each step must remain distinct from the other.

[31] The first step examines whether the impugned law created or contributed to a disproportionate impact on the claimant group based on a protected ground. This necessarily entails drawing a comparison between the claimant group and other groups or the general population (*Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, at p. 164). The second step, in turn, asks whether that impact imposes burdens or denies benefits in a manner that *has the effect of reinforcing, perpetuating, or exacerbating a disadvantage*. The conclusion that an impugned law has a disproportionate impact on a protected group (step one) does not lead automatically to a finding that the distinction is discriminatory (step two).⁸⁴⁷ [*emphasis added*]

784. The key consideration at step one is whether the evidence establishes that the impugned law or state action creates a distinction between groups. To determine this, the Court must look to the

⁸⁴⁷ *Sharma*, *supra* note 759, at paras. 30-31

impugned law's actual effects and assess whether those affects differ across groups. The analysis inherently involves a comparison:

[62] The role of comparison at the first step is to establish a “distinction”. Inherent in the word “distinction” is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).⁸⁴⁸

785. The case law does not impose any formalistic requirements on the evidence required to establish that a law or regulatory action creates a distinction between groups, but the case law is clear that the evidence must focus on “the effect of the law and the situation of the claimant group.”⁸⁴⁹ The approach to step one taken by the plaintiffs does neither. By framing the comparison as between the broad visible minority groups with which many of the plate holders identify on the one hand and all non-minority, non-racialized Canadians in the general population on the other, the plaintiffs fail to offer the Court any meaningful assistance on either the effect of the law at issue or the actual situation of the claimant group. The plaintiffs’ comparison analysis is nothing more than a rehashing of the broad statistical data without any connection to the actual regulatory action they claim is unconstitutional. In doing so, the plaintiffs seem to suggest that the Court can rely on statistical data about broad systemic disadvantage as a proxy for evidence about the effect of the law and the situation of the claimant group. This approach is not endorsed in the case law and it is not helpful to the Court.

A) The correct comparator group is not the general population

786. The plaintiffs have framed their argument at step one of the section 15(1) test as a comparison between: (a) the three visible minority groups to which the majority of plate holders belong and (b) the general public. This approach is problematic for a number of reasons. First, the plaintiffs misunderstand the case law. Second, the plaintiffs’ approach collapses the two steps of the section 15(1) test into a single step, contrary to the Supreme Court’s guidance in *Sharma*.

⁸⁴⁸ *Withler v. Canada (Attorney General)*, 2011 SCC 12 (CanLII), [2011] 1 SCR 396, at para. 62 [*Withler*]

⁸⁴⁹ *Withler* at para. 64; *Begum*, *supra* note 790, at para. 42; *Fraser*, *supra* note 760, at para. 48

787. The plaintiffs engage in step one of the section 15(1) analysis by selecting a comparator group. The plaintiffs argue that the appropriate comparator group is those non-minorities and non-racialized groups in the broader population.⁸⁵⁰ The plaintiffs then compare this population (all non-racialized people) to the three racialized groups to which a number of plate holders belong. The plaintiffs do not include actual plaintiff class members in this comparison. The previous sections explain why ignoring the actual circumstances of the plaintiff class members is fatal to the plaintiffs' claim. This section will explain why the plaintiffs' choice of comparator group – all non-racialized people in Ontario – is incorrect and fails to offer the Court any assistance in conducting the section 15(1) analysis.

788. The plaintiffs cite a single line from paragraph 31 of the *Sharma* decision (quoted above) as support for the proposition that the Court can look to the general public as a comparator group. The plaintiffs ignore the purpose of the comparative exercise, which is to determine whether the impugned law has a disproportionate impact on the claimant class. This is a fatal error in the plaintiffs' analysis: if the impugned law does not affect the general public, then comparing the claimant class to the general public says nothing about the impact of the impugned law.

789. Rather, the Court may look to the general public as a comparator when the impugned law – by its nature – affects the general public. Because the section 15(1) analysis is intended to be focused on the actual impact of the impugned law, the comparator group changes with the nature of that law. Laws that affect the general public require a comparison against the general public to fully assess the impact of the impugned law.

790. The following chart illustrates how the comparator group changes to meet the context of the impugned law in the Supreme Court's section 15(1) jurisprudence.

⁸⁵⁰ The plaintiffs make no mention of immigration status as a basis of comparison.

Case	Impugned Law	Claimed Ground of Discrimination	Comparator Groups
<i>Fraser v. Canada (Attorney General)</i> , 2020 SCC 28	Pension plans for RCMP officers	Sex	participants in job-sharing program / non-participants
<i>Andrews v. Law Society of British Columbia</i> , [1989] 1 SCR 143	Admission to the provincial Bar	Citizenship	non-citizen candidates for bar admission / citizen candidates for bar admission
<i>Symes v. Canada</i> , [1993] 4 SCR 695	Tax deductions for childcare expenses	Sex	women who incur childcare expenses / men who incur childcare expenses
<i>Withler v. Canada (Attorney General)</i> , 2011 SCC 12	Public service pension plans	Age	widows receiving a public service pension over the age of 65 / widows receiving a public service pension under the age of 65
<i>Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux</i> , 2018 SCC 17	Pay equity amelioration measures	Sex	female workers in Quebec subject to the statutory scheme / male workers in Quebec
<i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 SCR 624	Health care delivery	Disability	people with hearing impairment / people without hearing impairment
<i>Law v. Canada (Minister of Employment and Immigration)</i> , [1999] 1 SCR 497	Pension plans	Age	widows and widowers under the age of 45 / married people under the age of 45
<i>British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union</i> , [1999] 3 SCR 3	Employment requirements for firefighters	Sex	female firefighters / male firefighters
<i>Vriend v. Alberta</i> , [1998] 1 SCR 493	Human rights protections for employment	Sexual orientation	homosexual Albertans / Albertans who fall under other protected grounds pursuant to the <i>Individual's Rights Protection Act</i>

791. The impugned law in this case is the City's actions in regulating the VFH industry. These regulatory actions affected the participants in the VFH industry. It is the case that the City regulates vehicles for hire with the broad objective of public safety, accessibility, and consumer protection, but it cannot be said that the City's measures in regulating vehicles-for-hire affect the general public.

792. Even more so in this case, where the plaintiffs' claim of disadvantage is framed entirely in loss of taxi plate license value as the exclusive metric by which the plaintiffs claim their disadvantage is to be measured, then a comparison to the general public is unhelpful. Members of the general public do not hold taxi plate licences and were therefore not affected by any decrease in plate value in the secondary market as a result of the City's regulatory action.

793. Accordingly, the plaintiffs' comparison analysis focusing on broad demographic groups and comparing those to the general public is simply inapt and unhelpful.

794. As set out below, it is the City's position that – were the Court to conduct a comparison – any comparison under the section 15(1) analysis should include the members of the VFH industry, that is, taxi plate license holders, taxi drivers, and PTC drivers.

795. Finally, on the assessment of relative disadvantage, where the basis of the claimed impact of the City's regulatory action is loss of plate values, those who hold a higher number of plates stand to experience greater impact. As explained above, the evidence shows that the class members who hold the greatest numbers of plates are either White individuals or corporations. Ignoring this fact at step one of the section 15(1) analysis will skew the Court's assessment of relative impact.

B) The plaintiffs' discrimination analysis collapses the two steps of the section 15(1) test

796. The Plaintiffs' central error is to collapse the two steps of the discrimination analysis and apply evidence of broad, statistical trends of historic disadvantage to the first step of the test instead of leading evidence that shows how the impugned law has created a distinction based on an enumerated or analogous ground.

797. This key error is the same error made by the Court of Appeal in *Sharma*. The Supreme Court of Canada described this error as collapsing the two-step section 15(1) framework into a single step:

[69] The Court of Appeal collapsed the two-step s. 15(1) framework into a single step. In doing so, it erred in two ways. First, it failed to clearly delineate Ms. Sharma's evidentiary burden at each step of analysis, using broad evidence of historic disadvantage to satisfy the causation burden at both steps:

The distinction that is created by the impact of the impugned provisions relates to the overincarceration of Aboriginal offenders, not their overrepresentation in the criminal justice system. By removing the ability to impose a conditional sentence instead of a prison sentence for an offence, the effect on an Aboriginal offender is to undermine the purpose and remedial effect of s. 718.2(e) in addressing the substantive inequality between Aboriginal and non-Aboriginal people manifested in overincarceration within the criminal justice system, which has been acknowledged by Parliament and the courts as requiring redress. [*emphasis added*; para. 79.]

[70] Secondly, when analyzing Ms. Sharma's evidence at the first step, the court erred by using the second-step s. 15(1) requirements:

Where a law establishes a new benefit, but does so in a discriminatory manner, that law will "create" a distinction. But where, as here, a law removes a remedial provision that was put in place to alleviate the discriminatory effect of other laws, then the removal of that remedial provision may not create a new distinction, but it will reinforce, perpetuate, or exacerbate the discriminatory effect that was intended to be alleviated by the remedial provision. [*Emphasis added*; para. 83.]

[71] To recall, the focus at the first step is on a disproportionate impact, not historic or systemic disadvantage. The Court of Appeal addressed the wrong question at step one, focusing on the link between colonial policies and overincarceration of Indigenous peoples. While the situation of the claimant group is relevant at step one (see *Fraser*, at paras. 56-57), it is not sufficient on its own to establish disproportionate impact. Nor is it enough to show that the law restricts an ameliorative program.⁸⁵¹ [*emphasis added*]

798. The plaintiffs make the same error here. The plaintiffs rely on broad statistical data showing patterns of disadvantage for certain visible minority groups at the first step in the discrimination analysis. But, the focus at the first step is on a disproportionate impact, not historic or systemic disadvantage. The plaintiffs' focus on systemic disadvantage at the first step of the test is evident from their submissions.

⁸⁵¹ *Sharma*, *supra* note 759, at paras. 69-71

799. The plaintiffs argue, at paragraph 375 of their written submissions, that a “proper s. 15 analysis ... can only be done by comparing the situations of the racialized and immigrant group from which plate owners are drawn to the broader non-racialized and non-immigrant population.”⁸⁵² The plaintiffs go on to argue, at paragraph 376, that “it is only appropriate to compare the plate owners – and the disadvantaged groups from which they are drawn – to the population at large.” [*emphasis added*]⁸⁵³

800. The plaintiffs collapse the two steps of the section 15(1) analysis by ignoring the actual circumstances of the plate holders and the actual impact of the City’s regulatory action on them. Instead, the plaintiffs focus on statistical evidence of generalized historic and systemic disadvantage at the first step of the test. By doing so, the plaintiffs ignore the focus of the first step, which is to identify disproportionate impact resulting from the City’s regulatory action.

801. Indeed, during the trial, plaintiffs’ counsel explained that their discrimination claim was based on historical disadvantage only, and not current disadvantage. Counsel explained that the plaintiffs’ evidence on the disadvantage of the class members would be provided through expert opinion and that the remainder of the witnesses would speak to historical disadvantage:

MR. BARQAWI: Your Honour, on, on that point, and it's, I think it's important for you to situate this witness' evidence, and others like him that, that will be coming forward today and the next few days, in, in proper context. They are not here to give evidence about the legal test for discrimination in the sense of whether there's current disadvantage or historical disadvantage. There is an expert who has been retained who will provide opinion evidence on the disadvantage of, of the, of the class members.

...

MR. BARQAWI: Your, Your Honour, I think if, if, if, if you want to go by the pleadings, as, as you probably should, it's, it's, and a discrimination claim is looking at, at historical disadvantage and how the city's, the city's alleged conduct in changing the by-law perpetuates or exacerbates that disadvantage. It's not about current disadvantage.⁸⁵⁴ [*emphasis added*]

⁸⁵² Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 375.

⁸⁵³ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 376.

⁸⁵⁴ Ziad Mezher, cross examination, January 18, 2023, *supra* note 26, at p. 40 line 11 to p. 41 line 17

802. As set out above, the plaintiffs' opinion evidence (given by Dr. Ornstein) spoke only to broad statistical trends, and not to the actual circumstances of the claimant group.

7) The correct approach to step one

803. Following the test set out in the case law, the correct approach to step one of the section 15(1) analysis is to consider the actual impact on the impugned law or state action on the claimant group and then compare that impact to the impact the law has had on other groups. As set out above, the plaintiffs deliberately failed to do so. The following section sets out the approach that was open to the plaintiffs and it highlights the evidence that the plaintiffs ought to have advanced in order to satisfy step one of the legal test for adverse impact discrimination.

A) Case law example: Ontario Teacher Candidates' Council

804. The Divisional Court's recent decision in *Ontario Teacher Candidates' Council v. The Queen*⁸⁵⁵ provides a helpful example of the type of evidence required to satisfy the test for adverse impact discrimination under section 15(1). In particular, the decision illustrates the way in which qualitative and quantitative evidence fits within the two-step framework set out in the jurisprudence and clarified by the Supreme Court in *Sharma*. The issue in *OTCC* was whether the regulation requiring all teacher candidates to pass a mathematics proficiency test (MPT) was discriminatory. All graduates from teachers' college were required to pass the MPT before they could be certified as teachers.

805. In the *OTCC* decision, the Divisional Court considered both stages of the section 15(1) test separately. At the first stage, the Divisional Court considered both quantitative evidence about the actual impact of the test on teacher candidates from a variety of demographic groups and qualitative evidence about the experience of racialized teacher candidates who were subject to the MPT requirement. At this first stage, the Divisional Court looked at:

⁸⁵⁵ *Ontario Teacher Candidates' Council v. The Queen*, 2021 ONSC 7386 [OTCC]; note that contrary to paragraph 307 of the Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, this decision has not been upheld at the Court of Appeal – the decision is under appeal, but the appeal has not yet been heard.

- (a) Evidence about the circumstances of the claimant group (including evidence of historical discrimination in the education system),
- (b) Academic literature on the impact of standardized testing generally, and
- (c) Qualitative and quantitative evidence about the impact of the MPT specifically.

806. The quantitative evidence came from a survey conducted during the administration of the test. In the administration of the MPT, the regulator had conducted a survey that catalogued data about each candidate's racial identity.⁸⁵⁶ This demographic data, when correlated with pass-fail rates for the MPT showed that Black, Indigenous, and Latinx candidates were seven times more likely to fail the test than White candidates.⁸⁵⁷

807. The Divisional Court also heard qualitative evidence from an individual Black teacher candidate. This witness explained his educational experience growing up in Cameroon and his university education in China and Norway. The individual candidate witness described his difficulty in passing the MPT, even after multiple attempts.

808. The Divisional Court relied on this evidence to conclude that the MPT requirement had resulted in a real impact on teacher candidates in Ontario. Among that group of candidates, those who identified as Black, Indigenous, or Latinx experienced a different impact: recorded pass rates were markedly lower for these racialized candidates than those of candidates from other groups. The statistical data on actual pass rates by demographic group evidenced differential impact on the basis of race. The Court relied on qualitative evidence and academic literature to conclude that the differential impact felt by racialized teacher candidates was the result of stereotyping and historical disadvantage. The Court concluded that racialized people had experienced historical disadvantage within the education system that led to decreased opportunities. The MPT – which excluded Black, Indigenous, and Latinx people from the

⁸⁵⁶ *OTCC*, *supra* note 855, at paras. 32-33

⁸⁵⁷ *Ibid* at paras. 74-81

teaching profession at a greater rate than candidates from other groups – stood as an additional barrier to inclusion in the education system.

809. On this evidentiary foundation, the Divisional Court could conclude that the MPT infringed the section 15(1) rights of Black, Indigenous, and Latinx teacher candidates.

810. It is instructive to contrast the evidence advanced in the *OTCC* case with the evidence advanced by the plaintiffs in this case. In the *OTCC* case, the Court had statistical data of the actual impact of the impugned regulation in practice. That statistical data showed that certain demographic groups were failing the MPT at a greater rate than other groups. This is the type of evidence the Court requires to conclude that the impugned law has a disproportionate impact based on an enumerated or analogous ground.

811. In this case, the plaintiffs have admitted that the statistical evidence they have advanced has nothing to do with the impact of the regulatory action in question. As a result, this Court has no evidence before it on which it can conclude whether the City's impugned regulatory action affects certain groups differently than other groups. Without this basic threshold evidence, this Court cannot determine the actual impact of the impugned regulatory action on the claimant group, let alone determine whether that impact differs across demographic groups.

B) Establishing disproportionate impact – what evidence would be helpful?

812. A proper analysis of disproportionate impact involves examining the actual impact of the impugned law on the claimant group and then comparing that impact with the impact of the same law on others in the social and political setting in which the question arises.⁸⁵⁸

⁸⁵⁸ *Andrews*, *supra* note 759, at p. 164; cited in *Sharma*, *supra* note 759, at [para. 31](#); cited in Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 368

813. The Supreme Court has confirmed that statistical data can be useful to establish disproportionate impact, but the statistical comparators must be selected from the “pool of people adversely affected” by the regulatory action:

Courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the “results of a system” may provide concrete proof that members of protected groups are being disproportionately impacted. This evidence may include statistics, especially if the pool of people adversely affected by a criterion or standard includes both members of a protected group and members of more advantaged groups.⁸⁵⁹ [*emphasis added*]

814. In this case, the obvious comparison is between racialized and immigrant plate holders on the one hand and plate holders who are not immigrants or racialized on the other. Both these groups were affected by the City’s regulatory action. If it can be shown that the impact of that regulatory action was felt differently by different groups, this may begin to establish disproportionate impact. Dr. Galabuzi testified that comparing the effects of the City’s regulatory action on racialized and immigrant plate holders to the effects on White, non-immigrant plate holders would assist the Court to isolate the effects of the City’s actions:

Q. Can Dr. Ornstein's comparison here that he's describing at page 13, can it help us isolate the effect of the City's regulatory change?

A. It cannot.

Q. In your view, for this purpose, what would be a better comparison?

A. I think in my view, since it made the effort to provide all this information, the income information, low income or poverty information, it, it would have been helpful if he had provided that information for the particular group that is — constitutes the plaintiffs and then compared that with maybe other members of the industry and in particular if we're dealing with the issue of race, with the white population within the industry.

Q. So when you say white population within the industry, do you mean white taxi plate holders?

A. Yes⁸⁶⁰

⁸⁵⁹ *Fraser*, *supra* note 760 at [para. 58](#) [citations omitted].

⁸⁶⁰ Grace-Edward Galabuzi, examination in chief, February 15, 2023, *supra* note 757, at o. 34 lines 6-22

815. The plaintiffs have criticized Dr. Galabuzi for positing this comparison. The plaintiffs argue that since Dr. Galabuzi did not suggest this comparison in his expert report, the Court should ignore his testimony on this point.⁸⁶¹ The Plaintiffs argue that suggesting this comparison “opens a new field of inquiry.”

816. On the contrary – as the case law establishes, determining the proper comparison to assess whether the impugned law has a disproportionate impact on protected groups is the very heart of step one of the discrimination analysis. Identifying the proper comparator is a question of law, and is for the Court to decide – not an expert witness. The thrust of Dr. Galabuzi’s evidence is to illustrate that Dr. Ornstein’s report fails to “isolate the effect of the City’s regulatory change.”⁸⁶² Indeed, Dr. Ornstein himself admitted that he did not consider the City’s regulatory action and his report was not intended to identify the effects of any regulatory change on the plaintiff class. Dr. Ornstein admitted he was not even generally aware of what the impugned by-law was about.⁸⁶³ Accordingly, it was open to Dr. Galabuzi – based on the stated mandate of his report – to critique Dr. Ornstein’s failure to provide sufficient data which could “isolate the effect of the City’s regulatory change.”

817. Moreover, the Court dismissed the plaintiffs’ objection on this point and determined that Dr. Galabuzi’s commentary on Dr. Ornstein’s methodology is within the scope of his report.

818. The legal test, established by the case law, requires this Court to assess the impact of the impugned regulatory action and determine whether that impact disproportionately affects the claimant group on the basis of an enumerated or analogous ground. The case law requires a comparison of the effect of the impugned law on those in the claimant group and others in the social and political setting in which the question arises. Logic dictates two options for this comparison – one targeted, one broader.

⁸⁶¹ Plaintiffs’ Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 411.

⁸⁶² Exhibit 230, *supra* note 835, p. 3 A930

⁸⁶³ Michael Ornstein, cross examination, January 24, 2023, *supra* note 782, at p. 18 lines 13-27

819. The targeted comparison option is to compare the effect of the City's regulatory action on various groups within the class of taxi plate license holders. Since the claimant group is defined as immigrants and those identifying with the Arab, South Asian, and Black visible minority groups, the proper comparison would be to consider the effect of the law on plate holders who fit that description on the one hand, and those who do not on the other. This would encompass all European ethnic groups (English, French, Eastern European), which are classified as "White"⁸⁶⁴ as well as the remaining visible minority groups. Dr. Galabuzi explained why a targeted comparison is appropriate:

Q. Okay. And flipping back to your report at page seven of your report, CaseLines A-934, you say at paragraph one, sort of the middle of that, the middle of that first paragraph under heading one. You say, "However, there is a question as to whether that is the appropriate comparator or cohort for this purpose." What, what do you mean by that? What's your critique of Dr. Ornstein's comparison?

A. So in, in a different context, if Dr. Ornstein is writing a sociological paper that simply allows us to understand whether there's a difference in experience in terms of economic wellbeing especially in the labour market, I think he could use the comparison that he was using. But in this context, as I understand it, there's a claim that a particular population was disadvantaged by an action that was undertaken by the City of Ottawa. And in that context, I think you would want to make a comparison between the population that is allegedly disadvantaged and the population that was not disadvantaged. So you would have — you would want to compare people maybe in the industry who are racialized, and those who are not racialized so that you can establish the, the impact of the change in regulation. It's not that useful to compare people who you are alleging were disadvantaged by the impact of the, the regulatory change to the broader population which was not in any way, shape or form likely to be impacted adversely or otherwise because they're not in the, in the industry.⁸⁶⁵ [emphasis added]

820. The broader comparison would be to consider the VFH industry holistically. This approach would consider not only taxi plate holders, but also taxi drivers and PTC drivers. Each of these constituencies were affected by the impugned regulatory action in this case. They are the "others in the social and political setting in which the question arises" that the case law speaks to.

821. Either of these comparisons would have enabled the Court to conduct the first step of the section 15(1) test. These comparisons would have allowed the Court to assess the actual impact of the City's

⁸⁶⁴ Dr. Ornstein testified that "White clearly includes all the European ethnic groups." Michael Ornstein, examination in chief, January 24, 2023, *supra* note 782, at p. 34 lines 21-22

⁸⁶⁵ Grace-Edward Galabuzi, examination in chief, February 15, 2023, *supra* note 757, at p.16 line 17 to p. 17 line 19

regulatory action on the relevant participants in the VFH industry and then to compare that impact on various groups. Comparing broad demographic groups as the plaintiffs have done does not give the Court the evidence it needs to conduct the first step of the section 15(1) test.

822. Any comparison in this case must also take into account the distribution of plates among plate holders, and not simply compare the number of racialized plate holders to White plate holders. The plaintiffs are claiming that the impact of City's regulatory action must be measured by the resulting change to the price of taxi plate licences in the secondary market. Since this is the metric proposed by the plaintiffs for measuring the impact, this measurement must be on a per-plate rather than a per-plate holder basis. Yet, the plaintiffs measure the racialization of the plate holder class on a per-plate holder basis. Measuring the impact of the impugned regulatory action on this basis ignores the fact that multi-plate holders are primarily White.

823. This consideration is particularly relevant to Mr. Dadi's comment that "White Canadians would never have their retirement money taken away so easily."⁸⁶⁶ Of course, this comment ignores the fact that 10% of the plate holders are White and the majority of the multi-plate holders are White. These White plate holders experienced the same effects from the City's regulatory action as did the racialized plate holders.

C) Conclusion on step one

824. The plaintiffs' step one analysis is of no assistance to the Court. It relies on logically-flawed connections between statistical averages and the plate holders' actual circumstances. It conflates step one and step two of the section 15(1) test. It ignores any consideration of the actual impact of the City's regulatory action.

825. Ultimately, the plaintiffs' step one analysis simply points to the generalized economic disadvantage experienced by members of certain visible minority groups within Canadian society.

⁸⁶⁶ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 397

These statistics are not controversial, but they tell the Court nothing about the effect of the City's regulatory action or whether certain groups have experienced disproportionate impact as a result of that action. Simply put, the plaintiffs have failed to give the Court the evidence it needs to determine whether step one of the section 15(1) test has been met.

8) Discrimination analysis, step two: is the City's regulatory action arbitrary?

826. In the section 15(1) test set out by the Supreme Court of Canada, the Court only moves to step two once step one has been satisfied. The test is structured in this way to emphasize that the purpose of section 15(1) is to guarantee "substantive equality." In *Sharma*, the Court emphasized the importance of maintaining analytical separation between the two steps of the section 15(1) test.⁸⁶⁷

827. In the City's submission, the plaintiffs have failed to satisfy step one of the section 15(1) test. Accordingly, the Court should not move on to consider step two. However, in the alternative, the City submits that the plaintiffs have also failed to satisfy step two of the test.

828. In order to satisfy step two of the test, the claimant must demonstrate that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage.⁸⁶⁸ The state is entitled to differentiate between groups in legislation or regulation. That differentiation will only constitute discrimination sufficient to meet the burden of step two if it is arbitrary and based on irrelevant personal characteristics.⁸⁶⁹

829. When a Court is considering the arbitrariness of a regulatory action that draws lines between groups, it should consider the broader regulatory scheme or policy, including:

- (a) The objects of the scheme,
- (b) Whether a policy is designed to benefit a number of different groups,

⁸⁶⁷ *Sharma*, *supra* note 759, at [para. 30](#)

⁸⁶⁸ *Sharma*, *supra* note 759, at [para 51](#)

⁸⁶⁹ *Sharma*, *supra* note 759, at [para 57](#), citing *Taypotat*, *supra* note 765, at [para 28](#).

- (c) The allocation of resources,
- (d) The particular policy goals sought to be achieved, and
- (e) Whether the lines drawn are mindful as to those factors.⁸⁷⁰

830. The plaintiffs spend four paragraphs out of their 500-paragraph submission on step two of the section 15(1) test. These brief submissions fail to offer the Court any guidance on whether any of these requirements of step two of the test have been met.

831. The evidence led at trial about the full regulatory context establishes that the City's regulatory action was not arbitrary; it was designed to benefit a number of groups, and it was designed to achieve the public policy goals of ensuring public safety, accessibility, and consumer protection. Indeed, the evidence led by the City shows that the City consulted widely with affected stakeholders. As explained by the City's witnesses, this wide consultation was intended to assess the potential impacts on all stakeholders in the VFH industry. Broad consultation of affected stakeholders ensures that regulatory action is not arbitrary.

832. Finally, it is clear from examining the full regulatory context that the introduction of the 2016 By-law resulted in a net benefit to taxi drivers and PTC drivers. These affected stakeholders also tend to be racialized and typified by the same visible minority groups as the plate holders.

A) The plaintiffs fail to address the full regulatory context

833. To determine whether a distinction is discriminatory under the second step of the section 15(1) test, courts should consider the broader legislative context.

[57] Such an approach is well-supported in our jurisprudence. In *Vriend v. Alberta*, [1998] 1 SCR 493, this Court held “[t]he comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection” (para. 96). Similarly, in *Withler*, the analysis was said to entail consideration of “the full context of the claimant group’s situation and the actual impact of the law on that situation” (para. 43). Where the impugned provision is part of a larger legislative scheme (as is often so), the

⁸⁷⁰ *Sharma*, *supra* note 759, at para 59, citing *Withler*, *supra* note 848, at paras 3, 38, 40, 67 and 81.

Court explained, that broader scheme must be accounted for (para. 3), and the “ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis” (para. 38 (emphasis added)). In *Taypotat*, Abella J. harboured “serious doubts” that the impugned law imposed arbitrary disadvantage, particularly after considering the context of the relevant legislation “as a whole” (para. 28).

[58] Most recently, in *C.P.*, the constitutionality of s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (“YCJA”) was at issue. The impugned provision did not provide young persons an automatic right of appeal to this Court where an appellate judge below dissents on a question of law, as the *Criminal Code* provides to adult offenders. Chief Justice Wagner, writing for four members of this Court, explicitly and carefully considered the entire legislative scheme, observing that the YCJA is designed to balance multiple goals — not only enhanced procedural protections, but also timely intervention and prompt resolution (para. 146). He further explained that an “approach requiring line-by-line parity with the *Criminal Code* without reference to the distinct nature of the underlying scheme of the YCJA would indeed be contrary to the contextual approach” (para. 145). In choosing not to provide young persons with an automatic right to appeal, he concluded “Parliament did not discriminate against them, but responded to the reality of their lives” (para. 162). Therefore, step two was not satisfied. We would endorse this approach, as it is consistent with *Withler*, *Taypotat*, and *Vriend*.

[59] Relevant considerations include: the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors (*Withler*, at para. 67; see also paras. 3, 38, 40 and 81).⁸⁷¹ [*emphasis added*]

834. The Court should consider the broader legislative context when determining whether a distinction is discriminatory under step two. Where the impugned provisions are part of a broader legislative scheme, that “broader scheme must be accounted for”,⁸⁷² and the “ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis” [*emphasis in original*].⁸⁷³

835. The plaintiffs have conceded that they did not present any statistical evidence on the effects of the City’s regulatory action. In addition, the plaintiffs have completely failed to address the full regulatory context that led to that action. As set out above, the Court heard voluminous testimony about the history of taxi regulation in Ottawa and the multitude of competing interests that the City had to balance when drafting the 2016 By-law. Finally, the plaintiffs completely fail to address any component of the VFH

⁸⁷¹ *Sharma*, *supra* note 759, at [paras. 56-59](#)

⁸⁷² *Sharma*, *supra* note 759, at [para 57](#), citing *Withler*, *supra* note 848, at [para 3](#).

⁸⁷³ *Sharma*, *supra* note 759, at [para 57](#), quoting *Withler*, *supra* note 848 at [para 38](#)

industry beside plate holders. The full regulatory context includes both taxi drivers and PTC drivers. These stakeholders were also affected by the City's regulatory action, but in ways that differ from the experience of plate holders. The plaintiffs' failure to address these stakeholders deprives the Court of crucial evidence about the full regulatory context at issue here.

B) The City sought to balance a multitude of interests

836. As explained above in Common Issue 1, regulating the VFH industry is a complex task, involving a multitude of stakeholders and a need to balance competing interests. For the City, the overarching policy mandate is to ensure public safety, accessibility, and consumer protection. Any VFH policy that the City develops must be consistent with this goal. Similarly, as outlined above, any decision made by the City about by-law enforcement involves the efficient allocation of resources.

837. The plaintiffs claim that the City "disregarded" the interests of the plate holder class members – this is contrary to the evidence in the record. As set out in detail above, the evidence in the record is replete with examples of the City consulting with taxi industry participants and working together to achieve outcomes that balance the interests of various groups while fulfilling the City's mandate.⁸⁷⁴

838. With respect to the particular regulatory action at issue, the 2016 By-law, the City conducted extensive consultation with all stakeholders. As explained above, the City engaged KPMG to conduct a study and held an extended in-person consultation session.⁸⁷⁵ Through this process, the City gave all stakeholders an opportunity to comment on the regulation of the VFH industry in Ottawa. This consultative process gave all stakeholders the opportunity to alert the City to how they would be affected by the City's proposed regulatory changes. Regulatory actions that are tailored to the constituencies they affect are less likely to be arbitrary or based on irrelevant personal characteristics.

839. The City's regulatory solution took the comments from the industry into account and implemented a number of measures that were requested by the industry. Ultimately, the City was

⁸⁷⁴ *supra*, paras. 247-254

⁸⁷⁵ Exhibits 58, *supra* note 109; Exhibit 61, *supra* note 111

required to balance a number of competing interests (primarily those of the taxi plate license holders and the PTC services) against the public interest in having access to new VFH services, while at the same time fulfilling the City's primary mandate of ensuring public safety, accessibility, and consumer protection.

840. All of these considerations form part of the broader regulatory scheme to which the impugned regulatory actions of the City belong.

C) The 2016 By-law is not arbitrary

841. The arbitrariness of the legislative scheme is also relevant at step two of the section 15(1) analysis. Legislation that distinguishes between groups based on an individual's actual capacities will rarely be discriminatory.⁸⁷⁶

842. The plaintiffs argue that the City's regulatory action is discriminatory because the impact of this action "was not felt by anyone else" apart from plate holders from certain visible minority group. This argument ignores three key points:

- (a) Plate holders from all demographic groups experienced the same effects from the City's regulatory action, regardless of visible minority status.
- (b) Plate ownership is concentrated in the hands of a few multi-plate owners. These multi-plate owners – who experience the regulatory effects the strongest – are primarily White and of European descent.
- (c) The plaintiffs ignore the majority of the participants in the VFH industry, namely taxi drivers and PTC drivers, who are just as racialized as the plate holders.

843. These facts lead to two legal conclusions:

⁸⁷⁶ *Sharma, supra note 759*, at [para 53](#), citing *Andrews, supra note 759*, at pp. [174-175](#) [*Andrews*].

- (a) Any impact felt by taxi plate license holders is based on their choice to acquire a plate license, not any personal characteristics (i.e. the regulatory action makes distinctions based on the plate holders' actual capacities).
- (b) Status as a racialized person or immigrant is equally meaningful for taxi drivers and PTC drivers, two constituencies who experienced a benefit from the City's regulatory action.

D) Any effects of the City's regulatory action are based on status as a plate holder, not personal characteristics

844. One possible basis for rejecting a section 15(1) discrimination claim is where a harm experienced by certain members of a protected group results from specific choices made by those members (in this case, the choice to purchase a taxi plate licence). State action or policy does not offend section 15(1) if members of the affected group can choose whether to be subjected to it or not. Of course, this principle does not prevail where the choice itself is a result of systemic oppression linked to the personal characteristics of those affected. In order to prove that this choice should not be a basis for rejecting the claim, the claimants must prove that their choice resulted from systemic oppression or persecution linked to their personal characteristics.⁸⁷⁷

845. The plaintiffs seem to suggest that the plate holders' choice to acquire a taxi plate license is explained by the phenomenon of "ethnic niches".⁸⁷⁸ The plaintiffs argue that economic and sociological conditions lead people from certain ethnic groups to particular professions like taxi driving. This argument misses the point. The question relevant to the plaintiffs' claim is not about the choice to work as a taxi driver, it is about the choice to acquire a taxi plate license. As explained above, the testimony of the SPHs is that they made this choice for business and speculative reasons, not because of systemic oppression. As set out above, the evidence led at trial proves that the acquisition of a taxi plate license

⁸⁷⁷ *Fraser*, *supra* note 760, at [paras 85-92](#)

⁸⁷⁸ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, paras. 345-349

is simply a business decision, and it is in no way connected to the economic vulnerability that typifies the new immigrant experience.

846. None of the SPH witnesses testified that their identity as a racialized person or as an immigrant factored into their decision to acquire a taxi plate license. Indeed, each of the SPH witnesses had been in Canada for over a decade before they acquired a plate and each of them described it as a business decision. Each SPH had the resources to borrow capital for the investment (either by leveraging another capital asset or through family connections). The evidence shows that these debts were readily repaid.

847. The majority in *Fraser* explained that some “choices” are themselves shaped by systemic inequality. These choices are so intrinsically bound up with one’s personal characteristics and the structural conditions they face as a result of those characteristics as to be illusory. The majority explained that these “choices” often lie beyond the individual’s effective control.⁸⁷⁹

848. This is not the case for the SPHs’ choice to acquire a taxi plate license. Each of the SPHs explained that his choice to acquire a plate was motivated by a desire to (a) generate passive income by renting the plate to others and (b) generate a return on investment by selling the plate to someone else for more than the purchase price. Each SPH testified that he hoped this additional income would give him more free time to spend with family. These are universal desires and independent of race or immigration status. Indeed, individuals who can choose to use passive income to increase their free time tend to be economically advantaged.

849. The Human Rights Tribunal of Ontario made a similar finding in the *Addai* decision, which is discussed in detail below.

850. Similarly, Dr. Ornstein confirmed on cross-examination that entry into the taxi industry is not an inevitability for the visible minority groups at issue here. Dr. Ornstein confirmed that the census data shows members of these visible minority groups can be found in a variety of professions. In fact, many

⁸⁷⁹ *Fraser*, paras. 90-91

profession,s such as medicine or public service, have more members of these visible minority groups than the taxi industry.⁸⁸⁰

851. Finally, the record is clear that the plate holders are not the only participants in the VFH industry. These other participants are equally affected by the City's regulatory action, and these other participants are equally racialized.

852. Therefore it is impossible to conclude that taxi plate acquisition is anything other than a personal choice, motivated by expectation of financial gain.

E) The plate holders are not the only racialized market participants

853. The plaintiffs take the position that the taxi industry in general is racialized.⁸⁸¹ This is not controversial. However, the plaintiffs repeatedly conflate taxi plate license holders with the entire taxi industry. The broader VFH industry involves at least two other participants: taxi drivers and – more recently – PTC drivers.

854. The City's 2016 By-law set the regulatory framework for a new paradigm in the VFH industry. The advent of PTCs and their flexible service delivery model represents even fewer barriers to entry for new immigrants who need a way to earn a living while they become established in Canada. As set out below, the immigrants who benefit from the introduction of PTCs fall within the same broad categories of visible minority as do the taxi plate license holders.

855. The plaintiffs' *Charter* argument rests on a myopic focus on racialized and immigrant plate holders, while ignoring the racialized and immigrant population among taxi drivers who are also affected by the City's regulatory action. The evidence clearly shows that members of the same racialized and

⁸⁸⁰ Exhibit 92, Occupation - National Occupational Class - Arab and South Asian; Michael Ornstein, cross examination, January 24, 2023, *supra* note 782, p. 59 line 18 to p. 70 line 31

⁸⁸¹ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11 at para. 318.

immigrant groups that are prevalent within the plate holder class experience a benefit from the City's regulatory action.

856. The plaintiffs conflate plate ownership with taxi driving throughout their submissions, but the expert evidence they advanced expressly excludes any consideration of taxi drivers. Dr. Ornstein confirmed that he was not asked to consider data on taxi drivers:

Q. Okay. And then, of course, the taxi drivers themselves are also part of the taxi industry. Would you agree?

A. Yes.

Q. And you didn't analyze any data on taxi drivers, did you?

A. No.

Q. Okay. And you weren't asked to look at data on taxi drivers.

A. No.⁸⁸²

857. Drivers for PTC services are also participants in the VFH industry. The plaintiffs do not mention PTC drivers at all.

858. The evidence at trial establishes that all components of the VFH industry are racialized. The article by Li Xu describes the racialized groups prevalent among taxi drivers in Ottawa-Gatineau.⁸⁸³ Dr. Ornstein confirmed that the demographic composition of taxi drivers and taxi plate holders is "strikingly similar."⁸⁸⁴

859. The evidence in the record suggests that PTC drivers share many of the same demographic characteristics with taxi drivers. Neither expert witness addressed the demographic distribution of PTC drivers, but both offered their opinion that it was likely that PTC drivers would fall into the same

⁸⁸² Michael Ornstein, cross examination, January 24, 2023, *supra* 782, at p. 11 line 25 to p. 12 line 1

⁸⁸³ Exhibit 89, *supra* note 797, at Table 8, B-1-7652

⁸⁸⁴ Michael Ornstein, cross examination, January 24, 2023, *supra* 782, at p. 45 line 14 to p. 46 line 3

demographic categories as taxi drivers.⁸⁸⁵ Mr. Way confirmed that, in his experience, the taxi drivers who switched to Uber were racialized and immigrants.⁸⁸⁶

860. There is evidence in the record that speaks to the names of the Uber and Lyft drivers operating in the City between 2016 and 2022. Additional names of Uber drivers appear in the Triangle Report prepared for Metro.

861. On cross-examination, Dr. Ornstein confirmed the steps he took to determine the origins of the names in the plate holder list and classify each name according to a geographic origin to determine whether the person was likely to fall under a category of visible minority. Dr. Ornstein confirmed on cross-examination that the same process could be followed using either the list of names maintained by the City or the names of Uber drivers in the Triangle Investigations report.

862. When Dr. Ornstein conducted his analysis on a sample of names from the Triangle Investigations report, all the names in the sample fell under the category of Arabic.⁸⁸⁷ Mr. Way confirmed that the Triangle Investigation report he reviewed reported that the individuals who attended an Uber recruitment event appeared to be “individuals of Middle Eastern descent”. He also confirmed that there are individuals who have left the taxi industry to become Uber drivers, and these individuals are from the same racial and ethnic communities as the plaintiffs.⁸⁸⁸

863. Absent any formal analysis from Dr. Ornstein, this is the best evidence the Court has on the racialization of PTC drivers. Based on this evidence, the evidence about the racial composition of taxi drivers, as well as both experts’ opinion, it is reasonable to conclude that both taxi drivers and PTC drivers in Ottawa fall into roughly the same demographic categories as do the plate holders.

⁸⁸⁵ Michael Ornstein, , cross examination, January 24, 2023, *supra* 782, at p. 49 lines 12-30; Exhibit 230, *supra* 835, at pp. 10-11

⁸⁸⁶ Marc André Way, cross examination, January 12, 2023, *supra* note 31, at p. 132 line 11 to p. 134 line 13

⁸⁸⁷ Michael Ornstein, cross examination, January 24, 2023, *supra* 782, at p. 130 line 27 to p. 141 line 131

⁸⁸⁸ Marc André Way, cross examination, January 11, 2023, *supra* note 328, at p. 120 lines 14-26; Marc André Way, cross examination, January 12, 2023, *supra* note 31, at p. 130 line 24 to p. 134, line 13.

864. This evidence is significant. If the taxi drivers and PTC drivers fall under the same demographic categories as the taxi plate license holders, then Dr. Ornstein's analysis of Census data showing statistical disadvantage for certain visible minority groups applies equally to taxi drivers and PTC drivers. However, the plaintiffs have failed to consider any effect of the City's regulatory action on taxi and PTC drivers in their analysis. Since these groups fall within the same demographic categories as the plate holders, the plaintiffs must lead evidence that these groups also suffered a disadvantage from the City's action in order to establish that any claimed disproportionate effect is based on racialization or immigration status.

865. In reality, as set out below, the evidence points to a number of benefits enjoyed by taxi drivers and PTC drivers as a result of the City's regulatory action.

F) Other market participants have benefitted from City's regulatory action

866. The VFH industry in Ottawa (and in most major cities) is an interconnected network of complementary and competing interests, overlaid with economic and public interest considerations. The plaintiffs have narrowly focused on one component of that network, the taxi plate license holders, and one economic metric for that network, the value of plate licences in the secondary market. The plaintiffs point to the loss of value for these plate licences in the secondary market as proof of generalized "disadvantage" across the entire industry as a result of the City's regulatory actions with respect to PTCs. There is no evidence in the record to establish this. Aside from a handful of examples of reduced plate value, the plaintiffs have not offered any evidence about the effect of the City's regulatory action on the industry as a whole.

867. In particular, the plaintiffs have not provided any evidence about the PTC side of the industry. As it pertains to the plaintiffs' *Charter* argument, the plaintiffs have not provided any evidence that would enable the Court to assess the demographic makeup of the PTC industry participants. As explained above, this information is crucial at step one of the section 15(1) test., which requires the Court to consider the condition of others in the social and political setting in which the question arises.

868. Dr. Galabuzi describes this lack of data on PTC drivers as a “glaring gap.”⁸⁸⁹

Q. I'd like to turn to page 10 of your report. We're talking about what you — this heading that says, "Lack of Data on Uber Drivers". You describe this as a glaring gap in the evidence provided in Dr. Ornstein's report. What do you mean by that?

A. What I mean is that the claim being made is that an action was — a regulatory action was undertaken or that essentially opened the market to a new set of actors in, in the market. And I think if we had information about those new actors and their conditions, it would be a lot easier for us to establish what the impact of the regulatory action was, both on the, the existing actors, which would be the sort of drivers and plate owners, as well as this, this new group.

Q. Okay.

A. We would be able establish whether the impact was negative on the, on the old participants and positive on the new participants, for instance, right.

Q. Okay.

A. Or it was, or it was a wash across.⁸⁹⁰

869. Dr. Galabuzi's evidence was that changes that may be seen as negative by some industry participants (the plate holders), may be seen as positive by other industry participants (taxi drivers or PTC drivers). To fully assess the impact of the City's regulatory action, the Court requires evidence about these other industry participants.

870. As discussed above, there is evidence in the record to establish that taxi drivers and PTC drivers likely fall into the same visible minority groups as taxi plate license holders and are likely to be comprised of similar proportions of immigrants. Dr. Ornstein's theory of “ethnic niches” is based on experiences of taxi drivers, and there has been no suggestion that the theory would not apply equally to PTC drivers. Accordingly, if the plate license holders experienced a different impact from the City's regulatory action than did the taxi drivers or the PTC drivers, then the Court cannot conclude that the impact the plate holders experienced is based on racialization or immigrant status.

⁸⁸⁹ Exhibit 230, *supra* note 835, at pp. 10-11

⁸⁹⁰ Grace-Edward Galabuzi, examination in chief, February 16, 2023, *supra* note 785, at p. 40 lines 6-24

871. The evidence canvassed below establishes that taxi drivers and PTC drivers experienced a relative benefit from the introduction of PTC services into the market. This suggests that any adverse impact experienced by taxi plate license holders is a result of their status as plate holders, not as a result of any personal characteristics. This section will outline the evidence that speaks to the experience of taxi drivers and PTC drivers as a result of the City's regulatory action.

872. As explained in the article by Eric Tucker, the "Medallion Capitalism" stage of taxi economics is marked by an imbalance of power between plate holders and drivers.⁸⁹¹ In Ottawa, the relationship between taxi drivers and plate holders is governed by a series of collective bargaining agreements (CBAs) that set the parameters by which drivers can access the monopoly created by the plate licences and controlled by the plate holders.⁸⁹²

873. The evidence establishes that driving for a PTC represents employment with even lower barriers to entry than traditional taxi driving. At trial, a number of witnesses described driving for a PTC service as having "next to no obligations"⁸⁹³ as opposed to the numerous up-front costs associated with driving a traditional taxi as a result of the various fees charged by plate holders and brokers. Mr. Way testified that many of the night drivers who were working for single plate holders or single plate lessees left to drive for Uber.⁸⁹⁴

874. Mr. Mezher testified that his brother switched from driving a taxi to driving for Uber after he suffered a car accident. Mr. Mezher said that his brother relied on Uber's flexibility that allowed him to follow a schedule that accommodated his limited abilities.⁸⁹⁵

875. Mr. Mail also testified that he drives for Uber Eats because it gives him the flexibility to accommodate his reduced abilities after he was also in a car accident. Mr. Mail's experience is an

⁸⁹¹ Exhibit 93, Tucker, "Uber and the Making and Unmaking of Taxi Capitalisms", B-1-7625 – B-1-7631

⁸⁹² See Exhibit 1, Tabs 3-41, Various Collective Agreements, F4937-F6630; Exhibit 64, Capital Taxi CBS, 2019-2022, B-1-6854.

⁸⁹³ Marc André Way, examination in chief, January 10, 2023, *supra* note 30, at p. 6 lines 3-16

⁸⁹⁴ Marc André Way, examination in chief, January 10, 2023, *supra* note 30, at p. 5 line 26 to p. 6 line 6

⁸⁹⁵ Ziad Mezher, cross examination, January 18, 2023, *supra* note 26, at p. 50 lines 13-25

excellent example of the advantages that the PTC model offers to drivers. Because of Mr. Mail's accident, he was unable to drive for more than a few hours at a time. With this limitation, it did not make financial sense for Mr. Mail to continue to pay the monthly fees required under the CBA between taxi drivers and brokers.⁸⁹⁶ As a result, Mr. Mail chose to sell his plate license and drive for Uber Eats (Uber's food delivery service) because it offered flexible hours and did not require any up-front payments.⁸⁹⁷

876. Mr. Mail agreed that a number of other taxi drivers switched to Uber for similar reasons – to avoid up-front expenses and to work more flexible hours:

MR. BURKE: Q. All I'm trying to establish, Mr. Mail, is that you know there have been a number of taxi drivers that have now gone over and moved to, drive for Uber. Do you agree with that?

A. I said, yes, I agree with you.

Q. Right. And one of the reasons that they've done so is that it, the expenses are less?

A. That's right.

Q. And they're not paying them upfront?

A. No.

Q. Right? And they, they can work part-time?

A. Exactly.

Q. And they have more flexibility. Correct?

A. You're right.⁸⁹⁸

877. Those drivers who chose to stay in the traditional taxi industry also benefitted from the change in the regulatory environment. With the introduction of a service to compete with traditional taxis, the taxi drivers gained economic power in their negotiations with plate holders and brokers.

878. Dr. Galabuzi confirmed that taxi drivers are more vulnerable than plate holders.⁸⁹⁹ However, with the introduction of regulation for PTC services, taxi drivers gained some market power. For example,

⁸⁹⁶ Iskhak Mail, examination in chief, January 18, 2023, *supra* note 492, at p. 122 line 12 to p. 123 line 7

⁸⁹⁷ Iskhak Mail, examination in chief, January 18, 2023, *supra* note 492, at p. 124 line 32 to p. 125 line 13

⁸⁹⁸ Iskhak Mail, cross examination, January 19, 2023, *supra* note 26, at p. 128 line 30 to p. 129 line 11

⁸⁹⁹ Grace-Edward Galabuzi, examination in chief, February 16, 2023, *supra* note 785, at p. 39 lines 12-21

taxi drivers were able to negotiate a lower rental rate when renting from absentee plate holders.⁹⁰⁰ Mr.

Mezher confirmed that rental rates had dropped across the board:

Q. So let's say in two, 2012 or thereabouts, around 10 years ago, how much was plate rent?

A. About maybe 13, 1,400.

Q. Per month?

A. Yeah.

Q. Okay.

A. Give and take, less or a bit more.

Q. But now you said plate rent's free?

A. At this moment, plate rent, you can have it for free.⁹⁰¹

879. Mr. Way confirmed that, following the launch of PTC services in the City, taxi drivers gained power in collective bargaining negotiations with taxi brokers. Mr. Way explained how the introduction of ridesharing services meant that taxi brokers were forced to reduce the fees they charged to drivers because driver has the option to exit the traditional taxi industry altogether and drive for a PTC service:

Q. I believe you — earlier you had also testified about stand rent as a source of broker revenue?

A. So those are dispatching fees.

Q. Okay. Oh I see. Can you — so during this period again, 2014, 2015, can you describe what happened with stand rents monthly dispatch fees?

A. We were — during that period of time, collective agreements came up for renegotiation. And one of the things that it had — was, was very contentious was the amount that the brokers were charging on a monthly, on a monthly basis for stand rent or dispatched fees and we saw a reduction in our rents. We also saw where traditionally we would have an increase in rent year to year, that was put aside. In other words, the amount charges in the first year of the collective agreement was the amount charged in the last year of the collective agreement. There was no increases.

Q. Can you describe what — so overall, what was the effect on, on your revenue from stand rents and monthly dispatch fees?

⁹⁰⁰ Marc André Way, examination in chief, January 10, 2023, *supra* note 30, at p. 6 lines 7-14

⁹⁰¹ Ziad Mezher, cross examination, January 18, 2023, *supra* note 26, at p/ 48 line 27 to p. 49 line 4

A. Overall, it was a significant reduction in, in revenue for the brokers. The — and, and the plate owners. To the point where our financial — the financial institutions that we were dealing with started to get nervous.

Q. I'll return to that in a moment. What about the other sources of revenue you spoke about? You spoke about credit card and account fees?

A. So....

Q. And you also talked about rent from taxi plates. Can you describe what happened, first of all, with the — perhaps the credit card fees and the account fees?

A. So both of those fees are based on volume. So since you had much — a significant — 50 percent less customers, let's — we'll use that number. Your — the — it's — because you're based — you're using percentages, the amount collected was less. You're, you're taking a percentage from a lesser amount, right?

Q. I'm a lawyer and even I can understand what you're talking about. Okay. So you — so I think you alluded to this before, but I just want to clarify it with regard to the dispatch fees and the stand fees. Did — during this period, so 2014, 2015, were taxi drivers making any complaints or demands to plate owners and brokers about, about these fees?

A. Yes. So, for example, again, the, the stand rent is based on the collective agreement. The plate rent is also based on the collective agreement, but due to the impact that, that ridesharing had on, on our industry, we — the multi-plate owners had to reduce the rent being charged per month per plate to the drivers by 40 percent.

Q. So you're talking about the plate leasing system. How, how did this progress? How did this phenomenon progress over time from 2014, 2015, 2016?

A. It hasn't improved. As of today, it still has not improved. The number of plates that were returned to us since the beginning of, of ridesharing has, has not stabilized. We're — we are still not operating all of our taxi plates.

Q. Can you elaborate on this? I think you testified to this before, but could you, could you elaborate on the idea of plates being returned to you? What, what is that? What does it mean?

A. So it....

Q. And what's the effect?

A. So a driver that was a leasing a taxi plate on a monthly plate would give us a one-month notice and basically exit the industry and bring back his plate to the company and say we're not — I'm not renting this anymore. So we had to find either another person to rent for — that would rent the plate or lease the plate or we would put the plate on a car that we own and, and tried to put it on the road as a — on a weekly basis, on a weekly shift. Drivers who were operating rental vehicles, some chose to no longer rent from us and exit the industry and we know of some drivers that went to try and work for the ridesharing companies. So what, what — the impression that we received is that this, this concept that was being sold as individuals who own cars that would take a few rides as they were coming to work and taking a few rides as they were going back home was not necessarily the truth. The truth is the drivers were working in the same amount of hours as taxi drivers.

The notion that this was part-time work because it allowed people to earn a little bit on the side, to round up, to, to give themselves some spending money is often something that was said during this — some discussions that I've heard. Wasn't the case. The, the drivers went out and worked a full shift. So it was direct competition to the taxi industry and between '14 and '16, they were unregulated. So it's the equivalent of a bandit cab.⁹⁰²

880. Recently, in an arbitration decision between West Way, Ziptrack and Unifor, the unionized taxi drivers pushed for lower fees as a result of increased competition from PTC services:

The union points to a financial squeeze on drivers since the entry of Uber and Lyft into the industry. Those drivers have been paying the same amounts to the employer since the current collective agreement came into effect in 2012. It seeks a significant reduction in various fees paid to the employer.⁹⁰³

881. This evidence points to a shift in market power between taxi drivers and the union on the one hand and plate holders and brokers on the other. This first-hand evidence supports Dr. Galabuzi's theory that the opening up of the industry may create benefits for some of the drivers.⁹⁰⁴ This shift in market power has been caused, in part, by the City's regulatory action with respect to PTC services.

G) The “discrimination” claimed by the plaintiffs is simply a shift in market power from plate holders to drivers

882. It is this shift in market dynamics – from plate holders to drivers – that forms the true basis of the plaintiffs' discrimination claim. The plaintiffs claim that they have lost the value of their plate licences. This value is derived from the ability to extract rents from taxi drivers, who have no choice but to pay these rents if they are to earn income from driving. PTC services give drivers another option and this lowers the demand for the plate holders' asset, resulting in a shift of value from plate holders to drivers.

883. The central flaw in the plaintiffs' discrimination argument is that the evidence clearly shows that taxi plate license holders, taxi drivers, and PTC drivers all share the same demographic profile. These three groups are equally racialized and share an immigration background. Dr. Ornstein remarked that the “distribution of the birthplaces of the Ottawa-Gatineau immigrant taxi drivers is strikingly similar to

⁹⁰² Marc André Way, examination in chief, January 10, 2023, *supra* note 30, at p. 6 line 26 to p. 9 line 13

⁹⁰³ Marc André Way, examination in chief, January 10, 2023, *supra* note 30, at p. 21 line 1-16; Exhibit 65, Arbitration Award, April 1, 2020

⁹⁰⁴ Grace-Edward Galabuzi, examination in chief, February 15, 2023, *supra* note 757, at p. 41 lines 8-11; Exhibit 230, *supra* note 835, at A931

the plate owners.” [*emphasis added*]⁹⁰⁵ Logically, any differences in impacts experienced by these three groups as a result of the City’s regulatory actions cannot be on the basis of race or immigration status.

884. Presumably, immigrant and racialized taxi drivers and PTC drivers have had similar lived experiences as the plate holders who testified at trial. The plaintiffs did not tender a taxi driver or PTC driver witness. In addition, had the plaintiffs wanted to determine the actual effects of the City’s regulatory action on immigrant and racialized taxi drivers and PTC drivers, they could have asked their expert witness to study the matter more closely. Both Dr. Ornstein and Mr. Bourque confirmed that – had they been asked – they could have designed statistical analysis or a survey that would have provided data on the actual effects of the City’s regulatory action on the three primary groups affected by it.⁹⁰⁶ The plaintiffs chose not to conduct this analysis.

885. Not only do the plaintiffs ignore the effects of the City’s regulatory action on taxi drivers and PTC drivers, they also overstate the impact felt by the taxi plate license holders. The plaintiffs’ description of the disadvantages felt by the plate holders (set out at paragraphs 403 to 408 of the plaintiffs’ Closing Submissions) is replete with inaccuracies, omissions, and exaggerations.

886. For example:

- (a) Francophones and Hungarian Jews are no longer considered marginalized groups. Dr. Ornstein explained that the Census classifies these groups as White.
- (b) Mr. Way is not at risk of losing his business – there is no evidence in the record to suggest this. Mr. Way testified that he purchased his first two taxi plate licences in 2001 with the assistance of his father. He purchased each plate for \$83,000.⁹⁰⁷ Mr. Way obtained the majority of the taxi plate licences that he holds (either directly or through a corporation)

⁹⁰⁵ Exhibit 77, *supra* note 743, at p. 11.

⁹⁰⁶ Christian Bourque, cross examination, January 25, 2023, *supra* note 789, at p. 59 lines 10-22; Michael Ornstein, cross examination, January 24, 2023, *supra* note 782, at p. 57 line 22 to p. 59 line 13

⁹⁰⁷ Marc André Way, examination in chief, January 10, 2023, *supra* note 30, at p. 20 lines 8-23

from his uncle, Paul Thivierge.⁹⁰⁸ Mr. Way is President and CEO of Metro, and President and CEO of Coventry Connections.⁹⁰⁹ In 2014, Metro was valued at between \$8 million and \$11 million.⁹¹⁰ Mr. Way also owns a limousine service, an accessible taxi service, a car rental business, and a real estate business.⁹¹¹

- (c) As set out above, the plate holders are not disadvantaged. The alleged “demolishment” of plate values has not been proven. Neither has their retirement been “taken away.” The SPHs who testified agreed that they hold other retirement savings (RRSPs, TFSAs, real estate).⁹¹²
- (d) Mr. Mail is not the primary breadwinner in his family. His wife owns a successful hair salon business. Mr. Mail’s evidence about why he continues to drive for Uber Eats is contradictory: he claimed that he will be “kicked out of his home” but he also testified that his mortgage is paid off.⁹¹³
- (e) The fact that the SPHs debt-financed their investment in a plate license shows they are economically advantaged; disadvantaged people do not debt-finance a passive income asset.
- (f) The plaintiffs state that Mr. El-Feghaly had to “go back to construction” but they fail to note that Mr. El-Feghaly is the owner of the construction company.⁹¹⁴

887. For these reasons, the Court should reject the plaintiffs’ claim that the plate holders have experienced exacerbated disadvantage or stereotyping as a result of the City’s regulatory action.

⁹⁰⁸ Marc André Way, examination in chief, January 10, 2023, *supra* note 30, at p. 20 lines 24-26

⁹⁰⁹ Marc André Way, examination in chief, January 6, 2023, *supra* note 3, at p. 67 lines 10-20

⁹¹⁰ Exhibit 35, Collins Barrow Report, Feb 22, 2014

⁹¹¹ Marc André Way, examination in chief, January 10, 2023, *supra* note 30, at p. 69, lines 15-25

⁹¹² Ziad Mezher, cross examination, January 18, 2023, *supra* note 26, at p.69 line 28 to p. 70 line 12; Iskhak Mail, cross examination, January 19, 2023, *supra* note 26, at p. 52 lines 12-32

⁹¹³ Iskhak Mail, examination in chief, January 18, 2023, *supra* 492, at p. 124 lines 23-31

⁹¹⁴ Antoine El-Feghaly, cross examination, January 25, 2023, *supra* note 26, at p. 97 lines 3-19

9) The City's section 1 analysis

888. The plaintiffs are correct that if a claimant can prove a *prima facie* infringement of section 15(1) of the *Charter*, the evidentiary burden shifts to the state to lead evidence that establishes, on a balance of probabilities, that the limit on the *Charter* right is justified in a free and democratic society. The City has led that evidence, as set out in this section.

889. The plaintiffs are wrong, however, when they argue that section 1 must be expressly pled in the City's defence.

A) Section 1 does not need to be expressly pled

890. Of course, the City's position is that no section 1 analysis is required in this case. In the City's submission, the plaintiffs have failed to make out even step one of the section 15(1) test. The following section 1 analysis is for the benefit of the Court, should it determine that a *prima facie* breach of section 15(1) has been made out.

891. The plaintiffs have argued that the City has not expressly pled section 1. This is of no consequence. Section 1 is not a "defence" to a claimed infringement of a *Charter* right. Section 1 sets an inherent limit on all *Charter* rights and it does not need to be expressly pled like a limitations defence. The City does not dispute that it is the government entity that bears the evidentiary burden of making out a justification under section 1, but this is separate from the question of pleading.

892. Moreover, it is disingenuous for the plaintiffs to suggest that they have been taken by "surprise" by a section 1 justification. First, as mentioned, section 1 is an inherent limit on all *Charter* rights⁹¹⁵ and, as such, the need to address section 1 cannot come as a surprise to the plaintiffs. Second, the evidence that the City is advancing in support of its section 1 justification is evidence that the plaintiffs have had ample opportunity to probe both in discovery and at trial. There is no issue of trial fairness here.

⁹¹⁵ *R. v. Oakes*, [1986] 1 SCR 103, at paras. 63-71

B) The Oakes test

893. If the claimant establishes a *prima facie* breach of section 15(1) of the *Charter*, the burden shifts to the state to demonstrate that the breach is demonstrably justified under section 1. The test for justification under section 1 is well-established, and requires the state to demonstrate that:

- (a) The objective of the impugned provisions is pressing and substantial; and
- (b) There is proportionality between the state's objective and its chosen means.

Proportionality is understood to have three components:

- i. There is a rational connection between the impugned provisions and the objective;
- ii. The impugned provisions are minimally impairing, in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and
- iii. There is proportionality between the deleterious and salutary effects of the impugned provisions.⁹¹⁶

894. The Ontario Court of Appeal has confirmed that the objectives of protecting the health and safety of the public and ensuring consumer protection are pressing and substantial within the meaning of the *Oakes* test.⁹¹⁷

895. When determining whether there is proportionality between the state's objectives and its chosen means, the courts must accord the state a measure of deference. Proportionality does not require perfection, and section 1 only requires that the limits be "reasonable." There may be a number of

⁹¹⁶ *R. v. Brown*, 2022 SCC 18 at para 110, citing *R. v. Oakes*, 1986 CanLII 46 (SCC)

⁹¹⁷ *The Adult Entertainment Association of Canada v. Ottawa (City)*, 2007 ONCA 389 at para 67

possible solutions to a particular problem, and “a complex regulatory response” to that problem will garner a high degree of deference.⁹¹⁸

896. The rational connection test is not particularly onerous, and the state need only show that there is a causal connection between the *Charter* infringement and the state’s objective, “on the basis of reason or logic.”⁹¹⁹ Furthermore, the state’s burden will be met as long as certain applications of the impugned law are rationally connected to the legislative object.⁹²⁰

897. Under the minimal impairment branch of the test, the state must demonstrate, from the range of reasonable alternatives available, that there are not other means that are less rights-impairing to achieve the objective in question in a real and substantial manner.⁹²¹

898. However, the government need not pursue the least drastic means of achieving its objective. A law will meet the requirements of this test if it, “falls within a range of reasonable alternatives.”⁹²²

899. Evidence of consultation with affected parties will help establish that a range of possible options was explored, for the purposes of determining minimal impairment.⁹²³ Furthermore, in determining whether a scheme is reasonably minimally impairing, courts may look to laws and practices in other jurisdictions.⁹²⁴

900. In the final stage of analysis, the Court must balance the salutary effects of the impugned provisions against their deleterious effects on *Charter* rights. The Court must assess, in light of the practical and contextual details which are elucidated in the earlier stages of analysis, whether the

⁹¹⁸ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 97 [Carter], citing *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at ; and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 37 [Hutterian Brethren].

⁹¹⁹ *Brown*, supra note 916, at para 128, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), at para 153 [RJR].

⁹²⁰ *R. v. Appulonappa*, 2015 SCC 59 at para 80.

⁹²¹ *Carter*, supra note 918 at para 102, citing *Hutterian Brethren*, supra note 918 at para 55.

⁹²² *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para 150.

⁹²³ *Ibid* at para 157.

⁹²⁴ *Carter*, supra note 918 at paras 103-104.

benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.⁹²⁵

C) The City has led evidence to make out each step of the *Oakes* test

901. Should this Court determine that the plaintiffs have proven a *prima facie* infringement of section 15(1), the City has presented ample evidence to satisfy its burden under section 1.

902. The Court has heard volumes of evidence about the City's strategy in regulating the taxi industry as it has evolved over time. This strategy has always been connected to the City's key regulatory purposes: public safety, accessibility, and consumer protection. The City submits that these purposes are pressing and substantial.

903. The record is replete with studies that show municipal regulation of the VFH industry advances these goals.⁹²⁶ Accordingly, the City submits that by-laws aimed at regulating the taxi industry are rationally connected to the City's regulatory goals.

904. Finally, as set out above, the City submits that the plaintiffs have not established that their rights under section 15(1) have been infringed. However, the steps the City took in regulating the PTC industry were designed to take the interests of all affected constituencies into account and arrive at a solution that impacted each interest as little as possible while still achieving the City's mandate to ensure public safety, accessibility, and consumer protection.

905. These steps are detailed above under Common Issue 1. As set out above, the City began by attempting to enforce the existing by-law on PTC drivers.⁹²⁷ Then, the City shifted to a regulatory solution and engaged in broad consultation when considering how to structure that solution.⁹²⁸ Finally, the City arrived at a regulatory solution that allowed both traditional taxi services and PTC services to operate

⁹²⁵ *Hutterian Brethren*, *supra* note 918 at [para 77](#)

⁹²⁶ Exhibit 6, *supra* note 363, F2397; Exhibit 7, *supra* note 127, F2229; Exhibit 34, *supra* note 98, F2143; Exhibit 170, *supra* note 387, A2138

⁹²⁷ *supra* paras. 582-632

⁹²⁸ *supra*, paras. 189-194, 205-206, 230-243

in the City, each with its own tailored regulatory approach.⁹²⁹ It is significant to the section 1 test that a number of jurisdictions arrived at similar solutions to the regulation of PTC services as the City did.⁹³⁰

906. Before enacting the 2016 By-law, the City conducted broad consultations, both with industry experts and with the general public. The City ensured that these consultations were open to everyone, especially taxi industry stakeholders. The City advertised the consultations to all taxi union members in Ottawa.⁹³¹

907. In the course of these consultations, each segment of the VFH industry had an opportunity to comment on the City's proposed regulatory solution, including plate holders like Mr. Way, the taxi drivers' union, individual taxi drivers, and PTC drivers.⁹³²

908. Some stakeholders also sent written submissions to the City. Mr. Way confirmed that Coventry Connections' written submission did not address the discrimination issue that the plaintiffs are now raising in this case.⁹³³

909. Finally, the plaintiffs argue in their written submissions that the City failed to implement its own internal anti-discrimination policies, such as the Equity and Inclusion Lens and the Anti-Racism Strategy.⁹³⁴ First, the City submits that it implemented the guidance in these documents by engaging in widespread consultation with all affected stakeholder groups. These groups included taxi plate license holders, taxi drivers, and PTC drivers, who – as established by the evidence at trial – are predominantly racialized and immigrants.⁹³⁵

910. Second, the Local Planning Appeal Tribunal (now renamed the Ontario Land Tribunal) – in a case involving Mr. Way's real estate company, Brothers Real Estate Ltd.⁹³⁶ –determined that the City of

⁹²⁹ *supra*, paras. 242-246

⁹³⁰ *supra*, paras. 152-156

⁹³¹ Exhibit 4, City pamphlet sent to taxi union members

⁹³² Marc André Way, cross examination, January 13, 2023, *supra* note 86, at pp.102-120

⁹³³ Marc André Way, cross examination, January 13, 2023, *supra* note 86, at p. 68 line 29 to p. 69 line 7

⁹³⁴ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at paras. 377-386.

⁹³⁵ Leslie Donnelly, cross examination, January 30, 2023, *supra* 268, at p. 89 lines 3-11

⁹³⁶ Marc André Way, examination in chief, January 5, 2023, *supra* note 3, at p. 69 lines 12-22

Ottawa fulfils the requirements of its Equity and Inclusion Lens by engaging in broad consultation with stakeholders.⁹³⁷ The measures taken in that case are similar to those taken here.

911. Moreover, as set out above, the City's regulatory action with respect to PTC services involved a number of stakeholders, many of whom were racialized and immigrants. The City decided on a regulatory course of action that would ensure public safety, accessibility, and consumer protection. The City applied the Equity and Inclusion Lens to consider how that regulation would affect all industry participants, including taxi drivers and PTC drivers. On cross-examination, Ms. Donnelly explained how the City's regulatory review of the taxi industry took input from – and considered the interests of – the affected equity-deserving groups.⁹³⁸

912. The *Oakes* test does not impose a standard of perfection. The City submits that – by commissioning expert studies on the vehicle for industry and by engaging in widespread consultation that gathered input from all stakeholders in the industry – the City arrived at a regulatory solution that advances a pressing and substantial objective, that is rationally connected to that objective, and that is careful to have a minimal effect on any equality rights that may be engaged.

10) Human Rights Code

913. The test for establishing discrimination under the OHRC is similar to the *Charter* test. The plaintiffs must prove that:

- (a) They are members of protected groups;
- (b) That they were subject to adverse treatment; and
- (c) That their gender, race, colour or ancestry was a factor in the alleged adverse treatment.⁹³⁹

⁹³⁷ *Brothers Real Estate Ltd. v Ottawa (City)*, 2020 CanLII 41841 (ON LPAT) at paras. 290-291

⁹³⁸ Leslie Donnelly, cross examination, January 30, 2023, *supra* note 268, at p. 80 line 15 to p. 84 line

⁹³⁹ *Peel Law Association v. Pieters* 2013 ONCA 396 at para 56

914. Ontario has established the Human Rights Tribunal (“**HRTO**”) as a mechanism for Ontarians to enforce their rights under the *Code*. The Human Rights Tribunal has already considered a claim of racial discrimination in the context of taxi licensing and rejected it. The City referred to this case in its legal submissions and again at trial, but the plaintiffs have failed to address it or even mention the case in their written submissions. In the City’s submission, this case is directly on point and dispositive of the *Human Rights Code* issue.

915. In *Addai v. Toronto (City)*, the HRTO considered a discrimination claim related to the City of Toronto’s taxicab licensing regime.

916. Under Toronto’s taxicab licensing regime, there were two forms of taxicab plate licenses enabling licence holders to operate a standard taxicab (as opposed to an accessible taxicab, which requires a separate type of licence): Standard licenses, and Ambassador licenses.⁹⁴⁰ Standard licenses, which were the original form of taxicab plate licence issued by the City, could be transferred on the secondary market (notwithstanding that the licence holder does not actually own the licence – it is owned by the City),⁹⁴¹ and permitted the licence holder to hire additional drivers to operate the taxicab. By the 1980s, the City had effectively ceased issuing new Standard licenses. Between 1999 and 2005, Toronto issued approximately 1403 additional taxicab plate licenses under the new Ambassador class, which, in contrast to Standard licenses, could not be transferred on the secondary market and did not permit the hiring of additional drivers. Ambassador licenses were widely seen as inferior to Standard licenses for this reason.⁹⁴²

917. The complainant, Mr. Addai, alleged, and the HRTO agreed, that the licence holders of the inferior Ambassador licence were predominantly racialized, with ethnicity derived from particular parts of the world “including the Middle East, India, Pakistan and Africa.” In contrast, a large number of holders

⁹⁴⁰ *Addai v. Toronto (City)* 2012 HRTO 2252 at para 4 [*Addai*]

⁹⁴¹ *Ibid* at para 7

⁹⁴² *Ibid* at paras 5 -12.

of the superior Standard licence were “people of European descent.”⁹⁴³ In light of the demographic differences between the two groups of licence holders, the complainant alleged that Toronto’s decision to stop issuing Standard licenses and its introduction of the Ambassador licence constituted adverse effect discrimination contrary to the Ontario *Human Rights Code*. The HRTO described the basis of the discrimination claim as follows:

“[*The complainant*] does not allege that it is discriminatory for the respondent to make changes to the taxi licencing system in general. He alleges that the discrimination lies the introduction of a license that is not transferrable and does not permit the use of a second driver in a context where it is predominantly racialized men who would be disadvantaged by those changes.” [*emphasis added*].⁹⁴⁴

918. In dismissing the complaint, the HRTO relied on the Supreme Court’s decision in *Andrews* as requiring a claimant to demonstrate a connection between the discrimination alleged and the claimant’s protected personal characteristics.⁹⁴⁵ In *Addai*, the HRTO found that no such connection existed, and emphasized that “taxi drivers like [*the complainant*] voluntarily applied” for an Ambassador licence.⁹⁴⁶ In explaining the lack of connection between the complainant’s personal characteristics and the discrimination alleged, the HRTO held that:

the impact on [*the complainant*] and other racialized men in the taxi-industry has to be, at least in part, because of irrelevant personal differences in race and ethnicity. It is not sufficient to demonstrate that a group of racialized taxi drivers is experiencing adverse consequences as a result of changes to the structure of the taxi industry without making that connection.

I have considered Mr. Addai’s arguments and the issue of connection from a number of different perspectives. For example, there are circumstances which are so inextricably bound up with a prohibited ground that they made be said to be a proxy for that ground. In pregnancy cases it is not a defence to an allegation of sex discrimination that a woman was denied benefits on the basis of pregnancy. Pregnancy and sex are so inextricably bound up together that denying a service to a woman because of pregnancy is synonymous with denying a service on the basis of sex. In my view, the complainant cannot make out the connection between the prohibited grounds alleged and the disadvantage he experiences on this basis. His work as a taxi owner is not so inextricably bound up with his race, colour, ethnic origin and place of origin that any disadvantage he

⁹⁴³ *Ibid* at paras 13 and 41.

⁹⁴⁴ *Ibid* at para 14.

⁹⁴⁵ *Andrews*, *supra* 759, cited at Addai para 70, *supra* note 940

⁹⁴⁶ *Addai* at para 78

experiences as a taxi driver is synonymous with disadvantage on the basis of those personal characteristics. [emphasis added]⁹⁴⁷

919. This decision of the HRTO is on all-fours with the plaintiffs' claim in this case. As set out above, the decisions made by the members of the plaintiff class to acquire a taxi plate license are not so inextricably bound up with their race, colour, ethnic origin, or place of origin that any disadvantage they may have experienced as a result of the City's regulatory action could be considered synonymous with disadvantage on the basis of those personal characteristics.

920. The plaintiffs do not mention the *Addai* decision at all. They do not take issue with its conclusion and they do not attempt to distinguish it from this case. Therefore, on the basis of the HRTO's decision in *Addai*, this Court ought to dismiss the plaintiffs' claim under the *Human Rights Code*.

921. For the reasons set out above, the City submits that this Court must reject the plaintiffs' claims of discrimination under both the *Charter* and the *Human Rights Code*.

⁹⁴⁷ *Ibid* at paras 71-72.

COMMON ISSUE 4: Did the fees collected by the City under its Taxi By-law 2012-258 constitute an unlawful tax?

922. The parties agree that, pursuant to the *Municipal Act*, municipalities are generally prohibited from levying taxes on their constituents (other than property taxes).⁹⁴⁸ However, as outlined under the *Municipal Act*, municipalities are empowered to collect fees or charges in relation to the provision of services relating to a by-law.⁹⁴⁹ In particular, section 391(1) of the Act permits a municipality to impose fees for “for services or activities provided or done by or on behalf of it” [*emphasis added*].⁹⁵⁰ These fees are generally referred to as “user fees.”

923. There must be a reasonable nexus between fees levied under section 391 of the *Municipal Act* and the cost of the services funded by the fee. While the plaintiffs claim that the City must conduct a specific costing to justify user fees, they have offered no support for this proposition. The proposition advanced by them is incorrect at law. The City is entitled to a high degree of deference in terms of the methodology it employs to correlate user fees with its costs of providing services.

It is uncontroverted that the City provided services to the plaintiffs in relation to the 2012 By-law, which included the administration and enforcement of the regulatory regime. The user fees charged by the City under the 2012 By-law are reasonably correlated to the costs of these services, and are therefore lawful. Moreover, these fees represent a small fraction of the City’s total by-law enforcement budget, and a rounding error in the context of its overall budget. They are not imposed as a veiled tax for the purpose of raising general revenue.

⁹⁴⁸ *Municipal Act, 2001, S.O. 2001, c. 25, s. 17.*

⁹⁴⁹ See *Angus v. Corporation of the Municipality of Port Hope*, [2016 ONSC 3931](#) at para. 27 [*Angus*].

⁹⁵⁰ *Municipal Act, 2001, S.O. 2001, c. 25, s. 391(1)(a).*

1) The test for distinguishing between taxes and fees

A) General principles

924. A municipality that imposes a fee or charge pursuant to a municipal by-law must be mindful of how the fee or charge is calculated.⁹⁵¹ However, a municipality is not required to provide an exact accounting of the fees it charges and the associated costs in relation to the provision of a particular service. As expressly recognized by the Supreme Court of Canada in the leading case, *Eurig Estate (Re)*, in order to distinguish a fee from a tax, “a nexus must exist between the quantum charged and the cost of the service provided...” [*emphasis added*]⁹⁵² If such a nexus is established, then the amount charged will constitute a fee (not a tax).

925. The Court clarified this point, going on to state that:

In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice.⁹⁵³ [*emphasis added*]

926. Since the Court’s decision in *Eurig Estate*, Ontario courts have clarified the five-part test to determine whether a fee established by a municipality is in fact an illegal tax. Specifically, a fee will constitute a tax in circumstances where:

- (a) It is enforceable by law;
- (b) It is imposed under the authority of the legislature;
- (c) It is levied by a public body;
- (d) It is levied for a public purpose; and

⁹⁵¹ See e.g. *ibid*, s. 394(1).

⁹⁵² *Eurig Estate (Re)*, 1998 CanLII 801 (SCC) at para. 21 [*Eurig Estate (Re)*].

⁹⁵³ *Eurig Estate (Re)*, *ibid* at para. 22, cited in *Angus*, *supra* note 949, at para. 38.

- (e) There is no nexus between the charge and the cost of providing the service or program to those subject to the fee.⁹⁵⁴

927. Further, in *1736095 Ontario Ltd. v. Waterloo (City)*, the Ontario Divisional Court considered the following additional factors in determining whether the impugned fee in that matter was a tax:

- (a) Whether the fee was designed to be revenue neutral;
- (b) Whether the calculation of fees were based on best estimates of the costs associated with the service – including staffing and non-staffing expenditures relating to processing applications and enforcement efforts;
- (c) Whether the fees were used to defray expenses or raise revenue; and
- (d) Whether the fees are intended for a public purpose.⁹⁵⁵

928. Based on these factors, where a municipality imposes a levy to defray its expenses, this will constitute a permissible fee pursuant to the *Municipal Act*. However, where the main purpose of the levy is to raise municipal revenue, then this will constitute an unlawful tax.⁹⁵⁶

B) Evidence required to establish a reasonable connection

929. In order to determine whether there is a reasonable connection between the fees charged by a municipality and the cost of providing the service in question, municipalities are required to lead at least some evidence, beyond “statements of intent and reports containing no values or monetary comparisons”.⁹⁵⁷

⁹⁵⁴ See generally *Eurig Estate (Re)*, *supra* note 952; *1736095 Ontario Ltd. v. Waterloo (City)*, [2015 ONSC 6541](#) at [para. 45](#), cited in *Angus*, *supra* note 949 at [para. 29](#).

⁹⁵⁵ *Angus*, *supra* note 949, at [para. 30](#), summarizing *1736095 Ontario Ltd. v. Waterloo (City)*, *supra* note 954.

⁹⁵⁶ See *Urban Outdoor Trans Ad, a Division of Slight Communications Inc. v. Scarborough (City)* (2001), 2001 CarswellOnt 187 (Ont. CA) at para. 31, citing P. Hogg, *Constitutional Law of Canada* (Looseleaf Edition, vol. 2, at 30-18). See also *1736095 Ontario Ltd. v. Waterloo (City)*, *supra* note 954, at [para. 71](#).

⁹⁵⁷ See *Angus*, *supra* note 949 at [paras. 33 and 34](#).

930. However, the Court will generally defer to the municipality's methods in correlating fees with the cost of services. In *Greater Toronto Apartment Association v. Toronto (City)*, the Court held that in circumstances where a municipality has led evidence to show the actual determination and categorization of costs, and the fee in question has been determined on the basis of best estimates available to the municipality, "it is not for the court to look behind the methodology used and question the assumptions made in respect of individual values adopted."⁹⁵⁸ [*emphasis added*]

931. Rather, the Court will look closely at evidence of the municipality's intention behind its costing approach and analysis.⁹⁵⁹ Accordingly, mere evidence of errors in municipal calculations (even if those errors inadvertently generate a surplus) will be insufficient to prove a lack of reasonable connection between the fee charged by the municipality and the cost of the service in question.⁹⁶⁰

932. The principle that the Court will not look behind the municipality's methodology or question its assumptions is reflective of the broader trend in the last 40 years of Canadian jurisprudence towards broad deference to municipalities. It accords with the deference that is due to the City in the analysis of the standard of care.

2) Evidence

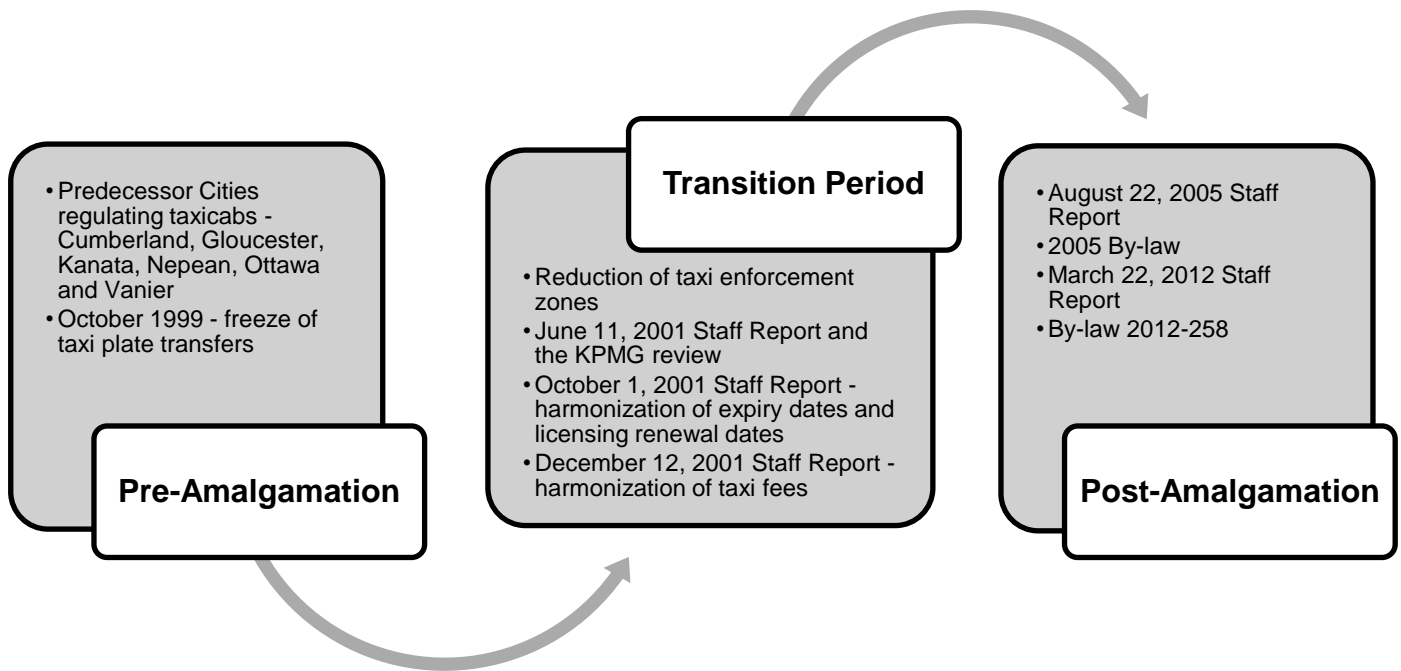
A) Harmonization of taxi fees in the City of Ottawa after amalgamation

933. The taxi fees complained of by the plaintiffs under the 2012 By-law date back to the pre-amalgamation period and have since progressed along the following timeline:

⁹⁵⁸ *Greater Toronto Apartment Association v. Toronto (City)*, 2012 ONSC 4448 at para. 41, cited by *Angus*, *supra* note 949 at para. 32; see also *Angus*, *supra* note 949 at para. 33.

⁹⁵⁹ *Ibid.*

⁹⁶⁰ *1736095 Ontario Ltd. v. Waterloo (City)*, *supra* note 954 at para. 66, citing *Greater Toronto Apartment Assn. v. Toronto (City)*, *supra* note 958 at para. 41.



934. As outlined above, prior to amalgamation only the Predecessor Cities of Cumberland, Gloucester, Kanata, Nepean, Ottawa and Vanier had enacted taxicab licensing by-laws.⁹⁶¹ These municipalities all charged licensing fees under their by-laws.

935. The process of amalgamating the City of Ottawa was a herculean task. At the time of amalgamation, Ms. Jones, who was the Director of By-law Services for the newly amalgamated City had oversight over most by-laws with a regulatory and enforcement component (such as by-laws associated with animal control and noise, as well as smoke-free regulations). Ms. Jones was also responsible for the enforcement and administration of all by-laws associated with licensing, such as taxis, limousines and refreshment vehicles.⁹⁶² In speaking about the process of amalgamation, she explained:

A...There were approximately 500 by-laws that were in existence prior to amalgamation. All of those by-laws when amalgamation occurred continued to remain in force until those by-laws were either repealed, amended or changed in, in some capacity. So a lot of the

⁹⁶¹ Statement of Agreed Facts, *supra* note 1, at para. 14, p. F3; see also Exhibit 2, Tab 316, *supra* note 98, F4319; Exhibit 2, Tab 315, *supra* note 98, F4277; Exhibit 2, Tab 314, *supra* note 98, F4253; Exhibit 2, Tab 317, *supra* note 98, F4360; Exhibit 2, Tabs 330 and 308, *supra* note 98 and Schedule 19, F4744 and F4041; and Exhibit 2, Tab 318, *supra* note 98, F4389.

⁹⁶² Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 3-4.

focus, particularly in the early years of amalgamation was on policy work and bringing reports forward to counsel to deal with those by-laws.⁹⁶³

936. Therefore, as was the case with other by-laws following amalgamation, the taxicab by-laws adopted by the Predecessor Cities that amalgamated into the City remained in effect, subject to various amendments.⁹⁶⁴ This resulted in six different by-laws providing for different categories of licence fees and different expiry dates.

937. City staff recognized that this regulatory framework for the taxi industry was not appropriate long-term.⁹⁶⁵ Accordingly, in the fall of 2001, the City began working on harmonizing these by-laws. The City began first with the harmonization of expiry dates of taxi related licences in the Predecessor Cities.⁹⁶⁶ Ms. Jones, who oversaw this work, highlighted the necessity of this approach soon after amalgamation:

Q. And why was that important to do as a early next step?

A. Well, it definitely needed, the licensing renewals and expiration of licenses were going to be taking place early in the new year. There were various dates depending on the former municipalities that amalgamated them. We wanted to ensure that we had those fees in place in time for the renewal dates coming into the new year.⁹⁶⁷ [emphasis added]

938. As part of this work, the City had begun to transition from six enforcement zones to three – Ottawa/Vanier, Gloucester/Cumberland and Nepean/Kanata.⁹⁶⁸ The purpose of reducing the number of enforcement zones was to avoid the logistical challenges associated with attempting to process licenses

⁹⁶³ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 4.

⁹⁶⁴ Statement of Agreed Facts, *supra* note 1, at para. 16, p. F3.

⁹⁶⁵ Exhibit 179, Report to Emergency and Protective Services Committee and Council, dated October 1, 2001 at F2183.

⁹⁶⁶ *Ibid* at F2184.

⁹⁶⁷ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 16.

⁹⁶⁸ These agreements permitted drivers to operate and access fares from a greater geographic area without penalty – for example, taxicab drivers licensed in the Former City were now permitted to pick up fares within the geographic area of Vanier. Similarly, taxicab drivers licensed in Vanier were now permitted to pick up fares within the geographic area of the Former City. However, of the newly adopted enforcement zones, only the Kanata/Nepean zone had harmonized their taxi fees by the time the December 2001 Staff Report was presented to EPSC and Council.

in each of these regions all at the same time.⁹⁶⁹ Accordingly, the City established three different sets of dates for each of the three enforcement zones in effect at the time.⁹⁷⁰

939. At the same time, City staff were also looking closely at the fees set out in each of the taxi by-laws in an effort to harmonize those as well.⁹⁷¹ To that end, City staff presented a report to the Emergency and Protective Services Committee (EPSC) and Council, dated December 12, 2001 (the “December 2001 Staff Report”).⁹⁷²

940. The purpose of the December 2001 Staff Report was to harmonize (in a comprehensive fashion) all of the fees relating to taxi licensing to ensure consistency in the City during the transition period.⁹⁷³ In order to set about harmonizing these fees, the City considered and reviewed the costs associated with administering and enforcing the taxi by-laws from the Predecessor Cities, as well as the City’s costs following amalgamation. Given the changes introduced by amalgamation – this was a complicated and challenging exercise. As Ms. Jones explained:

Q. And can you tell us, we'll look at the specific recommendations, which are found at the next page, page two, but before we go to those, can you tell us what was staff's process generally in developing their recommendations with respect to each licensing team?

A. Essentially, with the process and we we had a significant by-law review team that were looking at all these various by-laws, was to, and at the same time were bringing together staff from the various municipalities, whether they worked in offices in former geographic areas. Are they going to work together? Where were they going to be? But the process with respect to the by-laws was really to carry over the fees in a manner that we deem to be reasonable and look at the views in each of the municipalities and then came up with a fee that we deem to be more accurate and reflective of what our costs were involved at that point to administer and oversee the by-law. A lot of changes going on at that point, so it, it was a preliminary and first opportunity to begin to look at the fees in a new government under one regulatory body. [emphasis added]⁹⁷⁴

⁹⁶⁹ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 11-12.

⁹⁷⁰ Exhibit 48, Report to Emergency and Protective Services Committee and Council, dated December 12, 2001 at F2641; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 11, 21.

⁹⁷¹ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 11-12.

⁹⁷² Exhibit 48, *supra* note 970.

⁹⁷³ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 16-17.

⁹⁷⁴ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 17.

941. Harmonized taxi fees in the newly amalgamated City of Ottawa were expressly set with the intention of ensuring that the City could recover its costs associated with the administration and enforcement of its taxi by-laws.⁹⁷⁵

942. In so doing, the City did not conduct a line-by-line, granular analysis of its costs. Due to the practical constraints associated with harmonizing fees from the Predecessor Cities (each of which approached the regulation of the taxicab industry differently), City staff analyzed taxi costs at a high level, taking into consideration only those costs which were reasonable for the administration and enforcement of the taxi by-laws:

Q. ... How did the city assess its costs for administering and enforcing the taxicab licensing regime? How did it go about doing that with all of these different things happening at that time?

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

Q. And when you were going through that process, did you engage in a line by line analysis of your costs?

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

⁹⁷⁵ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 17-18.

started licensing, licensing every activity. There were even licensing lawyers and ATM machines and dentists and things like that. And it, it was really radical in the approach.

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

Q. You said in your answer that you thought that that might not be possible. And can you tell us why you're of that view?

A. Well, if if you go back in time and take a snapshot of what was going on at amalgamation, 11 lower tier, by-law and licensing offices and one upper tier. Collective agreements were different in each of those municipalities. Office environments were different. Legal issues were different. And then as we were moving forward over the next time, when you look at 2005 to actually [indiscernible] then come up with a brand new by-law, a number of things were changing and evolving. And so it was very difficult to pinpoint on a line by line item as to what the exact cost would be.⁹⁷⁶ [*emphasis added*]

943. In setting out their recommendations for harmonized taxi fees in the December 2001 Staff Report, City staff engaged in a comparative review of the taxi fees charged in all of the Predecessor Cities that had regulated taxis prior to amalgamation.⁹⁷⁷ By this point, a considerable amount of work had been undertaken to harmonize and consolidate the City's licensing by-laws and "come up with consistent regulations".⁹⁷⁸ The *Municipal Act* had also imposed a sunset clause requiring municipalities to review their licensing by-laws every five years.⁹⁷⁹ As such, City staff recognized that the taxi fees set out under the City's taxi by-laws in force at that time (which had existed prior to amalgamation and mostly been re-enacted and approved in the years shortly leading up to amalgamation), were "essentially a carryover of fees that had already been reviewed and approved by previous councils."⁹⁸⁰

944. With this in mind, City staff's first recommendation in the December 2001 Staff Report was to establish a single fee for each fee category under the City's taxi by-laws, along with a single information

⁹⁷⁶ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 18-20.

⁹⁷⁷ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 19.

⁹⁷⁸ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 21.

⁹⁷⁹ *Ibid.*

⁹⁸⁰ *Ibid.*

system.⁹⁸¹ To that end, the December 2001 Staff Report went on to propose harmonized fees for each of the following categories:

- (a) Licence Application – Processing Fees;⁹⁸²
- (b) Taxicab Driver – Annual Licence Fee;⁹⁸³
- (c) Taxicab Plate Holder Licence;⁹⁸⁴
- (d) Taxi Broker Licenses;⁹⁸⁵
- (e) Late Fees;⁹⁸⁶
- (f) Plate Transfer Fees;⁹⁸⁷
- (g) Replacement or Duplicate Licence Plates;⁹⁸⁸
- (h) Replacement or Duplicate Licence Certificate;⁹⁸⁹
- (i) Replacement Identification Cards;⁹⁹⁰
- (j) Replacement Tariff Cards;⁹⁹¹
- (k) Vehicle Re-Inspection Fees;⁹⁹²

⁹⁸¹ Exhibit 48, *supra* note 970, at F2641.

⁹⁸² *Ibid*

⁹⁸³ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 22.

⁹⁸⁴ It is important to note that, in the December 2001 Staff Report, City staff did not report or propose revisions to license fees relating to accessible taxi plates or Ambassador taxi plates. See Exhibit 48, *supra* note 970 at F2642; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 23.

⁹⁸⁵ Exhibit 48, *supra* note 970 at F2642-F2643; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 24-25.

⁹⁸⁶ Exhibit 48, *supra* note 970 at F2644.

⁹⁸⁷ Exhibit 48, *supra* note 970 at F2644; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 26.

⁹⁸⁸ Exhibit 48, *supra* note 970 at F2644.

⁹⁸⁹ *Ibid* at F2645.

⁹⁹⁰ *Ibid* at F2645.

⁹⁹¹ *Ibid* at F2645.

⁹⁹² *Ibid* at F2645-F2646.

(l) Meter Check fees (after initial check);⁹⁹³

(m) Tariff Rates.⁹⁹⁴

945. In addition, the December 2001 Staff Report also proposed some carry over fees from the Former City. Notably, in an attachment to the report (*i.e.* Attachment 1), the following plate transfer fees were also included by City staff for consideration by EPSC and City Council:⁹⁹⁵

Plate Transfer Fee Type	Fee Amount
Owner to Owner	10% of the true consideration in the sale agreement up to a maximum of \$5,800.00
Deceased Owner to legal spouse within three months of death of licensee	\$300.00

946. In the case of “Owner to Owner” fees, Ms. Jones explained that this fee was carried over from regulations that existed in the Former City (and therefore expanded to the amalgamated City).⁹⁹⁶ Each of the Predecessor Cities levied fees for processing such transfers, “ranging from \$1,075 in Gloucester, Nepean and Cumberland, to \$2,000 in Vanier, \$3,000 in Kanata and \$5,800 in Ottawa.”⁹⁹⁷

947. During the transition period, the City froze plate transfers until the freeze expired on January 1, 2001.⁹⁹⁸ Around that same time (*i.e.* at amalgamation), the City retained KPMG to undertake a comprehensive review of existing taxi regulations and to make recommendations – including with respect to plate transfer fees. In its consideration of these plate transfer fees, KPMG made the following observations and recommendations for a harmonized plate transfer fee in the amalgamated City:

...All these plates will become the same thing at the end of this process, so it is appropriate that the transfers be handled in a similar manner. The non-Ottawa plates will likely gain substantially in value while the Ottawa plates will more likely stabilize or decline for a period of time. The Ottawa approach was 10% of the transfer price until it was capped at

⁹⁹³ *Ibid* at F2646.

⁹⁹⁴ *Ibid* at F2646.

⁹⁹⁵ *bid* at F2648; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 29.

⁹⁹⁶ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 29.

⁹⁹⁷ Exhibit 7, *supra* note 127 at F2278; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 29-30.

⁹⁹⁸ *bid*.

\$5,800. Adopting this approach would not penalize transfers of lower value plates in the short-term, but would recognize the changes in value over time.⁹⁹⁹ [emphasis added]

948. In the case of “Deceased Owner” fees, Ms. Jones explained that, in recognition of those circumstances where taxi plate holders were single income earners for their families, the Former City’s taxi regulations permitted the transfer of a taxi plate to another member of the taxi plate holder’s family in the event of that individual’s death.¹⁰⁰⁰ For compassionate reasons, a reduced administrative fee of \$300.00 was applied to process plate transfers in such circumstances.¹⁰⁰¹

949. Therefore, to recover costs associated with effecting the transfer of the plate from one individual to another (and to ensure that the transferee had met the necessary requirements/qualifications to hold a taxi plate under the taxi by-laws), the City also proposed the carryover of each of these transfer fees in the December 2001 Staff Report.¹⁰⁰²

950. The EPSC reviewed and considered the December 2001 Staff Report on January 14, 2002. Ms. Jones, who presented the December 2001 Staff Report to the EPSC, brought forward City staff’s recommendations with respect to the harmonization of licensing fees.¹⁰⁰³ In so doing, Ms. Jones advised the EPSC that the proposed fees were overall “revenue neutral and intended to reflect cost recovery associated with supporting the regulation of the taxi industry.”¹⁰⁰⁴ Indeed, in response to questions about the City’s taxi-related costs, Ms. Jones expressed her opinion that the total estimated costs to the City

⁹⁹⁹ Exhibit 7 *supra* note 127 at F2278; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 28-30; Brian Bourns, Cross-Examination, February 2, 2023, *supra* note 266, at p. 40 – line 1-9; Brian Bourns, Cross-Examination, February 2, 2023, *supra* note 266, at p. 49 – line 35 to p. 50 – line 1-8; Brian Bourns, Re-Examination, February 2, 2023, *supra* note 266, at p. 74 – line 1-29.

¹⁰⁰⁰ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 27.

¹⁰⁰¹ Susan Jones, Cross-Examination, February 9, 2023, *supra* note 112, at p. 126, lines 5 – 16; see also Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 85, lines 30 – 32 to p. 86, lines 1 – 19.

¹⁰⁰² Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 28.

¹⁰⁰³ Exhibit 180, Emergency and Protective Services Committee Minutes 14, dated January 14, 2002 at B-1-9224- B-1-9225; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 31, 33.

¹⁰⁰⁴ Exhibit 180, *supra* 1003 at B-1-9225; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 33.

for the administration and enforcement of taxi regulations were in fact higher than the amounts the City received in revenue from the collection of taxi licence fees (on an annual basis).¹⁰⁰⁵

951. The EPSC and City Council went on to approve the December 2001 Staff Report, adopting the above harmonized taxi fees for the amalgamated City.¹⁰⁰⁶

B) Evolution of taxi fees in the City of Ottawa prior to the 2005 By-law

952. Following their adoption, the harmonized taxi fees adopted by the City remained in effect in the City until August 22, 2005, when City staff brought forward another report to the EPSC and City Council (the “**August 2005 Staff Report**”).¹⁰⁰⁷

953. Amongst the recommendations set out by City staff in the August 2005 Staff Report was a recommendation to “[replace] the existing taxi licensing by-laws with a new, single taxi by-law for the City.”¹⁰⁰⁸ As such, staff revisited the City’s existing taxi fees. In general, under the August 2005 Staff Report, most taxi fees remained unchanged,¹⁰⁰⁹ with the exception of the following specific recommendations from City staff:¹⁰¹⁰

- (a) Introduction of a \$50.00 fee, to be charged upon qualified persons wishing to be added to the City’s Accessible Priority List. City staff anticipated that the funds generated from this fee would be used to maintain the Accessible Priority List, offsetting the costs to the City associated with maintaining the accuracy and integrity of the list.¹⁰¹¹
- (b) Introduction of a ten cent (\$0.10) surcharge to cover costs incurred by taxi plate holders for the installation and maintenance of global positioning systems and digital security

¹⁰⁰⁵ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 34.

¹⁰⁰⁶ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 35.

¹⁰⁰⁷ Exhibit 49, *supra* note 391 at F3541.

¹⁰⁰⁸ Exhibit 49, , *supra* note 391 at F3541-F3542; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 36.

¹⁰⁰⁹ Exhibit 49, , *supra* note 391 at F3547.

¹⁰¹⁰ *Ibid* at F3542-F3544; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 37-38.

¹⁰¹¹ Exhibit 49, , *supra* note 391 at F3555.

cameras in taxicabs, which constituted new safety equipment requirements introduced and proposed by City staff in the August 2005 Staff Report. City staff proposed the adoption of this surcharge for a period to give taxi plate holders “time to save” for this equipment in advance of the proposed mandatory installation deadline of March 1, 2008.¹⁰¹²

- (c) An increase of the annual licence fee for Accessible Taxicab Plate Holders from \$1.00 to \$420.00. This increase was proposed by City staff to bring this fee on par with the annual licence fee for Standard Taxi Plate Holders.¹⁰¹³
- (d) A reduction of plate transfer fees between plate holders from a capped amount of \$5,800.00 (under the existing harmonized fee structure) to \$3,800.00. This reduction was proposed by City staff to better reflect the City’s current costs associated with this service, and to ensure more consistency in the application of fees. To that end, City staff reported that the reduced fee would reflect costs associated with “the administration and maintenance of the by-law, public consultation, consultant fees, Licence Committee, vehicle inspection fees, and prosecution and enforcement of both licensed and unlicensed activities.”¹⁰¹⁴
- (e) An increase to the maximum tariff rate that taxi drivers could charge for assisting passengers with bulky items from \$3.00 to \$10.00. City staff proposed this tariff rate increase in response to a request from industry.¹⁰¹⁵
- (f) An increase to the late fee for taxi plate licence renewals from \$50.00 to \$100.00. This increase was proposed by City staff “not only to provide additional motivation to renew

¹⁰¹² *Ibid* at F3562; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 37.

¹⁰¹³ Exhibit 49, *supra* note 391 at F3562; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 37-38.

¹⁰¹⁴ Exhibit 49, *supra* note 391 at F3562-F3563; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 38.

¹⁰¹⁵ , *supra* note 391 at F3563.

in a timely manner but to recover costs related to having to re-assign staff back to the administration of taxi licensing once the designated taxi renewal period has passed.”¹⁰¹⁶

954. The August 2005 Staff Report went on to be accepted by City Council during its meeting on September 29, 2005, resulting in the enactment of the 2005 By-law.¹⁰¹⁷ As a result of this, the taxi fees recommended in the August 2005 Staff Report were incorporated into Schedule C of the 2005 By-law.¹⁰¹⁸

C) Evolution of taxi fees in the City of Ottawa prior to the 2012 By-law

955. Following its enactment on November 9, 2005,¹⁰¹⁹ the fees established under the 2005 By-law remained relatively unchanged until 2012 (save for their consideration and periodic revision in the course of the City’s annual budget reviews, which is discussed in detail below).¹⁰²⁰

956. In 2012, the City undertook another comprehensive review of taxi fees as part of a broader review of the 2005 By-law. This resulted in City staff submitting another report to the CPSC (which was the committee that replaced the EPSC around 2008)¹⁰²¹ and Council on March 12, 2012 (the “**March 2012 Staff Report**”).¹⁰²²

957. In the March 2012 Staff Report, following a review of the 2005 By-law, City staff recommended the following to CPSC and City Council (a) a re-enactment of the 2005 By-law (subject to a series of specific amendments); and (b) series of directions to City staff (none of which related to taxi fees).¹⁰²³

¹⁰¹⁶ *Ibid*

¹⁰¹⁷ Exhibit 183, City of Ottawa City Council Minutes, dated September 28, 2005, pp. F3628-F3630; Exhibit 2, Tab 305, *supra* note 392 p. F3784; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 47-48.

¹⁰¹⁸ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 48; Exhibit 2, Tab 305, *supra* note 392, pp. F3830-F3831.

¹⁰¹⁹ See Exhibit 2, Tab 305, *supra* note 392, p. F3834.

¹⁰²⁰ See Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 49.

¹⁰²¹ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 13-14.

¹⁰²² Exhibit 13, *supra* note 396, at p. F2376.

¹⁰²³ Exhibit 13 *supra* note 396, at, p. F2376-F2377; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 49-50.

958. With respect to the proposed re-enactment of the 2005 By-law, amongst the amendments proposed by City staff was a recommendation to “[e]stablish a License Transfer Fee of \$3800 per plate upon the death of a plate holder with two or more plates to be transferred.”¹⁰²⁴ This was the only amendment proposed by City staff in relation to taxi fees in the March 2012 Staff Report.

959. As Ms. Jones explained during examination in chief, this recommendation arose out of an evolution in City staff’s understanding regarding the circumstances in which plates may be transferred following the death of a multiple plate holder (rather than a SPH). In particular, staff recognized that the transfer of multiple plates was administratively burdensome:

Q. And what is being recommended with respect to the transfer fee upon the death? What, what’s going on with respect to that?

A. What, what staff would have been looking at during this time period in, and going back and looking at why fees were implemented previously, the intent when that so called waiving of the city’s costs in terms of what was incurred to transfer a plate, the intent when it was going to a family member was really addressing that single individual, who’s the plate holder, who earned an income, and was supporting that individual’s family. When we began to have a closer look at perhaps a death of a plate holder who owned multi plates, for example, two or more. That was more of a business operation and different. And it was deemed on staff’s, on staff view that it it wasn’t, it was more equitable to be charging the same fees that other plate holders were, were doing. And we remained committed to, I guess, on compassionate grounds to provide that exemption for that single plate holder who passed away and wanted to ensure his family can still continue earn a living and reap the benefits of the revenues associated with that plate. It was a different concept when it came to a multi plate holder.¹⁰²⁵ [*emphasis added*]

960. In other words, City staff had discovered that, in the event of the death of a multiple plate holder, plates were transferred to the plate holder’s surviving family members at a reduced rate for business or strategic reasons. This was not consistent with the compassionate reasons upon which the plate transfer fee was initially reduced (and more burdensome on City staff from an administrative perspective).¹⁰²⁶ In light of this administrative burden, City staff recommended that an amendment be introduced to ensure

¹⁰²⁴ Exhibit 13 *supra* note 396, at, p. F2376; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 50.

¹⁰²⁵ Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 51-52.

¹⁰²⁶ See e.g. Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 99, lines 25 – 32 to p. 100, lines 1 – 10; see also Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 89, lines 1 – 22.

that the same plate transfer fee be applied for processing multiple plate transfers, irrespective of the underlying reason for the transfer:

In general, various municipal licensing fees are charged to offset the costs of administration and enforcement of the licensing regulations, and to avoid transferring those costs to the taxpayers. Currently, the fee associated with the transfer of a taxicab plate upon the death of the plate holder is significantly less than the fee for a regular plate transfer (i.e. \$300 and \$3800, respectively) even though the administrative review required in the case of the death of a plate holder is more involved than the regular transfers given the need to review additional legal documents such as death certificates and wills.

While it is recognized that the transfer of a single plate by a holder upon his death to his spouse or child is done to ensure continuing income and security for the family, the transfer of multiple plates represents a transfer of a large capital asset and is most complex administratively.

It is therefore recommended that Schedule "C" of the Taxi By-law be amended to require the payment of a License Transfer Fee of \$3800 per plate upon the death of the plate holder when two (2) or more plates are being transferred.¹⁰²⁷ [emphasis added]

961. The March 2012 Staff Report was considered by the CPSC at its meeting on March 22, 2012. The CPSC and City Council went on to carry the March 2012 Staff Report, resulting in the enactment of the City's 2012 By-law on July 11, 2012.¹⁰²⁸ Accordingly, the fees imposed by the 2012 By-law were set out under Schedule "C" of the 2012 By-law.¹⁰²⁹

D) Historical consultation with taxi stakeholders

962. It is important to note that City staff consulted with taxi industry stakeholders regarding the taxi fees proposed in each of the above reports (prior to their adoption by EPSC/CPSC and Council).¹⁰³⁰

963. In each case, there is no evidence that these consultations raised any concerns on the part of taxi industry participants that the City's proposed fees were not reflective of its costs associated with

¹⁰²⁷ Exhibit 13 *supra* note 396, at, p. F2380.

¹⁰²⁸ Exhibit 184, Community and Protective Services Committee Minutes 14, dated March 22, 2012, B-1-9297-B-1-9299; Exhibit 2, Tab 306, *supra* note 16, at p. F3957; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 54.

¹⁰²⁹ Exhibit 2, Tab 306, *supra* note 16, at pp. F3952-F3953; Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 93, line 20 – 26.

¹⁰³⁰ See e.g. Exhibit 48 *supra* note 970, at at F2646-F2647; Exhibit 48, *supra* note 970, at at F2650-F2651; Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 31; Exhibit 13, *supra* note 396, at, p. F2381; Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 52-53.

administration and enforcement of the City's taxi regulations, nor were any concerns raised that the fees constituted an unlawful tax.¹⁰³¹

E) The City of Ottawa's methodology for setting and adjusting user fees and charges

964. The reports discussed above, leading to the enactment of taxi fees in the 2012 By-law, reflect periodic and comprehensive reviews of the City's overall taxi fee structure. These reports also led to the baseline fees that are found in Schedule C of the 2012 By-law.

965. However, these reviews are not the only times during which the City has reviewed and amended its taxi fees. The City also looked at taxi fees more frequently as part of its annual budget process and as part of stakeholder consultations relating to the taxi meter rates set under the taxi by-law.

966. In either case, the City's methodology for reviewing taxi fees is set out in the City's "Fiscal Framework 2007" (the "**Framework**"), which was established in 2007. The Framework is described as follows:

This council-endorsed fiscal framework is the city's high-level roadmap to sustainable finances. It is the financial constitution that guides all financial decisions and is the primary instrument to measure the city's financial condition. It is also the financial plank of the City's commitment to provide residents with the best municipal government in Canada.¹⁰³²
[emphasis added]

967. The City's witness, Cyril Rogers, is the acting Chief Financial Officer and General Manager of Finance and Corporate Services for the organization.¹⁰³³ In examination in chief, Mr. Rogers elaborated on the purpose of the Framework, stating the following:

...

¹⁰³¹ See e.g. Exhibit 48, *supra* note 970, at at F2650-F2651; Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 31; Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at pp. 42-44; Exhibit 184 *supra* note 1028, at B-1-9293 and B-1-9297; see also Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 53; Exhibit 184, *supra* note 1028, at B-1-9297; Susan Jones, Examination in Chief, February 8, 2023, *supra* note 112, at p. 54.

¹⁰³² Exhibit 213, Fiscal Framework 2007, B-1-15023.

¹⁰³³ Cyril Rogers, Examination in Chief, February 14, 2023, p. 33, lines 20 – 21.

A. As the introduction says this, is a council endorsed fiscal framework, so this provides a fundamental framework for the overall finances of the city. It provides guidelines in terms of how we account for certain criteria, and how we build out our annual plans and budget.

Q. And can you just expand a bit more on what the purpose of this document is?

A. It really is to give a fundamental fiscal framework for finance and the organization in using, using for decision-making, allocation of budgets, and for fiscal management improvements of the organization.¹⁰³⁴ [*emphasis added*]

968. The Framework goes on to outline general requirements for setting and reviewing “user fees and service charges”. As Mr. Rogers explained, licensing fees (including taxi licensing fees) are a type of user fee, and hence are subject to the Framework.¹⁰³⁵

969. Among the requirements set out by the Framework in relation to user fees (and which are relevant to these proceedings) include guiding principles to:

- (a) Use objective criteria to determine when user fees apply, and the range of fees to be applied;
- (b) Ensure that recovery rates for services consider (among other things) operating and capital costs;
- (c) Ensure that fees are subject to periodic study and review;
- (d) Ensure that changes to user fees are transparent.¹⁰³⁶

970. When considering recovery rates in particular, Mr. Rogers noted that the above guidance is aimed at achieving “full cost recovery”,¹⁰³⁷ including recovery of the City’s *direct* and *indirect* costs:

Q. So when you say "full cost recovery," can you expand on what that means?

A. So specifically in a full cost recovery, there's direct costs, what we would classify from an accounting perspective. In the case of a bylaw, so that will be your bylaw officer that

¹⁰³⁴ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 37, lines 20 – 32 to p. 38, lines 1 – 10.

¹⁰³⁵ *Ibid* at p. 38, lines 23 – 30.

¹⁰³⁶ Exhibit 213, *supra* note 1032, at B-1-15029; see also Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 39, lines 2 – 13.

¹⁰³⁷ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 39, lines 7 – 13.

are on the streets, or [indiscernible] services. Indirect costs would be what we also consider overhead costs, so in terms of supporting the organization function, such as IT, HR, finance, those administrative type functions, those are what we consider indirect costs supporting the various organizations in terms of hiring, interviewing, IT type infrastructure, and equipment to support that service delivery.¹⁰³⁸ [*emphasis added*]

971. On the topic of full cost recovery, Mr. Rogers was careful to highlight the practical challenges associated with analyzing and accounting for all of the City's costs, particularly the City's indirect costs. This is because, as Mr. Rogers explained, indirect costs are "variable by nature", making it "very onerous and administrative to develop that costing, to a point where it probably would be counterproductive in terms of actually increasing the overhead cost to assign to a service."¹⁰³⁹

972. In the context of the City's BLRS Branch (which is responsible for administering and enforcing the City's taxi by-law), Mr. Rogers provided the following examples of indirect costs that are incurred by the City:

- (a) Finance-related costs, which are incurred through the support provided to by-law officers during budgeting and financial planning processes, and the financial assistance provided to BLRS when reporting to the CPSC and City Council in terms of its performance;
- (b) Human resource-related costs, which are incurred through the support provided to by-law officers in terms of interview or recruitment processes and human resource initiatives within the organization; and
- (c) Information technology-related costs, which include infrastructural costs (such as laptops, mobile phone devices, *etc.*) and the costs incurred through the technological support provided to by-law officers.¹⁰⁴⁰

¹⁰³⁸ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 38, lines 23 – 30 to p. 39, lines 1 – 25.

¹⁰³⁹ *Ibid*, at p. 40, lines 9 – 20.

¹⁰⁴⁰ *Ibid*, at p. 39, lines 31-32 to p. 40, lines 1 – 8.

973. The City has more recently (in 2019) adopted a User Fees and Charges Policy (the “**User Fee Policy**”),¹⁰⁴¹ which provides a more granularity and, and direction as to how and when to enact user fees, and criteria in terms of developing user fees.¹⁰⁴² However, the User Fee Policy only applies to: (1) newly enacted user fees; or (2) user fees that are subjected to a full review (effectively an audit), triggered when there is a significant deviation between the anticipated revenue and the costs funded by the user fee. No such deviation has occurred with user fees charged under the 2012 By-law.¹⁰⁴³

F) The City of Ottawa’s approach to periodic review and adjustment of taxi fees

974. Guided by the Framework and the User Fee Policy discussed above, Mr. Rogers went on to explain how (from a practical perspective) the City reviews its user fees during its annual budget processes.

MR. POLOWIN: Q. So bearing in mind that [Exhibit 215, City of Ottawa Operating and Capital Budget, dated December 9, 2015, B-1-14261] is a 770 page document, in brief, what does - what information is contained?

A. So the City provides a very detailed annual budget to council as per legislation for adoption and approval. Within this document it's broken down by department area and service area. The various programs within the City are identified, such as the rate program would be your, your water, utility, your waste water utility budget. The tax supported would be city services, such as winter operations and maintenance. That provides a detailed breakdown of the requested budget for each service area at the various cost element levels, so compensation, materials, purchase services. It also includes the user fee schedules for all departments and service areas where applicable. It also includes the capital budget programs, identifying all the various capital projects and programs across the City by department, in addition to an overview of each of the service areas function and purpose, if you will.¹⁰⁴⁴ [emphasis added]

975. In setting and reviewing the budget for each service area, the City uses a “base-budget” approach, which Mr. Rogers noted is consistent with most, if not all municipalities. This approach

¹⁰⁴¹ Exhibit 214, User Fees and Charges Policy, dated August 27, 2019, F507; see also Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 41, lines 15 – 16.

¹⁰⁴² *Ibid*, at, p. 41, lines 9 – 14.

¹⁰⁴³ *Ibid*, at, p. 41, lines 17 – p. 42 line 33.

¹⁰⁴⁴ *Ibid*, at, p. 45, lines 1 – 20; see also Exhibit 215, City of Ottawa Operating and Capital Budget, dated December 9, 2015, B-1-14261; Exhibit 216, City of Ottawa Operating and Capital Budget, dated November 30, 2011, B-1-10967; Exhibit 217, City of Ottawa Operating and Capital Budget, dated November 28, 2012, B-1-11753; Exhibit 218, City of Ottawa Operating and Capital Budget, dated November 27, 2013, B-1-12657; Exhibit 219, City of Ottawa Operating and Capital Budget, dated February 4, 2015, B-1-13483; Exhibit 220, City of Ottawa Operating and Capital Budget, dated December 14, 2016, B-1-9303; Exhibit 221, City of Ottawa Operating and Capital Budget, dated December 13, 2017, B-1-10151.

requires the City to engage in a year-to-year consideration of its incremental costs, using the previous year's actual budget as a baseline indicator of the anticipated costs required for each service area. In so doing, however, the City will also look for cost efficiencies and improvements wherever possible.¹⁰⁴⁵

976. The City's BLRS Branch, which is responsible for the administration and enforcement of the City's taxi by-law, represents one of the service areas captured in the City's annual budget.¹⁰⁴⁶ As explained by the City's witness, Tania McCumber, who is the City's Program Manager for Licensing, Administration and Enforcement,¹⁰⁴⁷ BLRS' budget addresses a number of key costs, including "officer costs, overtime costs, and if there is equipment purchases, court costs. Any expenditures related to that group."¹⁰⁴⁸

977. In other words, by virtue of the City's budget processes, on an annual basis, BLRS undertakes an analysis and review of its costs at a high level (rather than at a granular, activity level).¹⁰⁴⁹ As is noted above, this high-level approach to reviewing the costs associated with the City's administration and enforcement of its taxi regulations dates back to the pre-amalgamation period and has been the City's general approach since the harmonization of taxi fees. As was noted by Ms. Jones on re-examination, there were key historical reasons underpinning this approach:

Q. Now my friend asked you if you had ever seen a document that analyzes the specific costs associated with each taxi licensing fee. You indicated you had not. What would be the extent of the effort required to carry out the analysis that Mr. Conway suggests?

A. Would you further clarify with respect to these in terms of regulators trying to determine what the costs would be involved?

Q. Yeah.

A. And therein lies the, the complexity, and I had indicated the changes to the *Municipal Act* particularly since early nineties in terms of a municipality's authority to, to regulate license and whereby municipalities had complete authority to go ahead and license and this occurred. And if we're talking Ottawa-Carleton where Vanier, in particular, in my view went over the top to regulate way too many things, and I think it was done for the purposes

¹⁰⁴⁵ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 68, lines 3 – 25.

¹⁰⁴⁶ See e.g. Exhibit 215 *supra* note 1044, at B-1-14354 to B-1-14362.

¹⁰⁴⁷ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 7, lines 15 – 20.

¹⁰⁴⁸ Tania McCumber, Re-Examination, February 7, 2023, *supra* note 518, at p. 138.

¹⁰⁴⁹ See e.g. Susan Jones, Cross-Examination, February 9, 2023, *supra* note 112, at pp. 32, lines 4 – 32 to p. 34, lines 1 – 7.

of revenue. Changes occurred after that on behalf of the province where those authorities were pulled back. And it's certainly from the time I was coming in as a regulator and, and an individual seniority and management experiences as the one task going before council, the concept was when licensing fees were being introduced, we would take into account, we would address the reasonable costs related to licensing and administration. Some of the challenges with coming up with an accounting exercise where you would have the spreadsheet where there were several activities associated with licensing, some known, some unknown. You didn't predict for example, Uber coming in and what would be required there. So how do you determine an exact cost? At the same time, there are many factors that support a licensing and regulatory regime at the city and in municipalities right across Ontario. In addition to the actual officer who actually drives a vehicle who goes out and does inspections, you know, we have costs associated with the facilities to host those inspections. There's fuel costs which fluctuate. Uniquely for Ottawa and amalgamation was, we had 11 lower tier municipalities in one upper tier. All different collective agreements, by-law officers making different salaries, and so thereby trying to come up with the regime, a licensing committee, legal costs, consultants costs, there were too many variables, to be specific. So, again, we took into account what we deem to be the reasonable cost.¹⁰⁵⁰ [*emphasis added*]

978. In addition to the historical reasons behind this approach to reviewing costs, a number of the City's witnesses highlighted the continued practical reasons for maintaining this approach. For example, Ms. Hartig, who is responsible for BLRS' budget,¹⁰⁵¹ noted the following during examination in chief:

Q. All right. And did bylaw and regulatory services track the specific cost involved with the enforcement or the administration of the 2012 bylaw?

A. Well, insofar as, it's difficult to track in that the branch is not structured by program but rather by function. Meaning that we have all of our enforcement staff — lets, lets stick with — let's leave property standards and parking out of it. So, let's put just the bylaw officers who would do licensing and other sorts of things and taxis, those — sorry, I've lost my train of thought. So, we — yeah, so compensation for those it's all lumped together and actually all the compensation is lumped together, so it's very difficult to parse out, you know, how much of this compensation budget can be attributed to the cost of or the salaries those officers. They you could go more granular in terms of, you know, fleet, you know, so you, you got a, a fleet of — I'm not quite sure how many vehicles, that are used by different officers for different purposes. So, it's very difficult, as I said, to parse out very specifically for each licensing category. Does that — is, is that's enough?

Q. Yes, thank you.

A. Okay.¹⁰⁵² [*emphasis added*]

¹⁰⁵⁰ Susan Jones, Re-Examination, February 10, 2023, *supra* note 112, at pp. 90-91.

¹⁰⁵¹ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 78 – 32 to p. 31, lines 20 – 23; Christine Hartig, Examination in Chief, February 3, 2023, *supra* note 141, at p. 28 – 32 to p. 31, lines 1 – 2.

¹⁰⁵² Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 78, lines 20 – 24. See also Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 66, lines 11 – 32 to p. 67, lines 1 – 10.

979. From her perspective as a by-law officer, Ms. McCumber echoed Ms. Hartig's statements, stating the following:

Q. Does By-law and Regulatory Services specifically track its costs relating to individual licensing regimes or programs?

A. Yes.

Q. Can you tell us what type of costs are tracked specifically?

A. The costs that are tracked is equipment purchased, supplies required. I guess — I'm thinking here, it's a tricky one. So printer costs, supply costs, plate costs, things like that.

Q. And are those type of costs allocated to a specific licensing category?

A. Not always, no.

Q. And why would it be, why not or....

A. The reason for that is it's difficult to entirely break it down with the exception of the taxi I.D. card, printer or tariff card because those are very specific to that licensing category. Otherwise, all of the licensing categories supplies [merge] into one another.¹⁰⁵³ [*emphasis added*]

980. Finally, Mr. Rogers (from his perspective within the City's Finance Department), explained the accounting reasons justifying the City's approach to reviewing its costs (which includes its taxi costs). In so doing, he noted that the benefits of specific granular analysis would not be proportionate to the financial and administrative burdens that would be placed on the City:

Q. Are departments required - well, is Bylaw and Regulatory Services determine - require to determine the cost of specific services funded by a given license fee?

A. No.

Q. Why not?

A. Again, as I previously stated, the detailed analysis to create a very specific user fee or a function would be very onerous. If I liken an example to a bylaw officer, throughout their daily day, their work day of seven hours, they could be doing a number of tasks that touches a variety of user fees or services within that function. So managing your, your actual effort to a very specific task level would be very onus, in addition to even allocating that very variable indirect assumption and over allocation to support that task.

Q. Right. So you talked about a direct cost. What sort of effort would be determined - would be required to allocate those indirect costs?

¹⁰⁵³ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 53.

A. Again, it would be very administratively onerous. If I take an example of a finance - senior financial analyst supporting the bylaw function, they also could support the fire services, as an example. So allocating every component of their day to specific tasks, exclusively related to a specific function, would be very administrative. There's also synergies in terms of a lot of the task that we do are, basically, supporting a variety of services not unique to a specific task, so that, itself, would be present a challenge as well.

Q. What are some examples of that?

A. So when we do standard reporting from a GAP perspective in financial statements, some of the analysis that we're doing could cover, you know, all the Emergency Protective Services functions, it could cover other functions as well as we do that consolidation of financial reporting. So breaking those tasks down to specific areas and specific tasks within the services area, would be extremely onerous, and manual.

Q. And just for the benefit of the Court, you used the term "GAP." Can you just clarify what you meant?

A. Those are generally accepted accounting principles.

Q. All right. And would that exercise, that – the exercise of trying to determine specific allocation of costs to a given licencing program, would that produce accurate results?

A. Even the accuracy would be variable, because the variability of allocating indirect costs would be – there would have to be an assumption factor applied to that. And, specifically, I will cite the example, breaking down your seven hour day to a specific service area, then going down to the granular area of a specific task within the service area would be would be extremely challenging. Specifically, in addition to that, there are certain synergies between certain support functions that are applicable to more than one service area. So the allocation to do that would be extremely administrative and onerous, with some significant assumptions in place.

Q. And would that administrative exercise, would it have any impact on the amounts of the user fees themselves?

A. Yes.

Q. What would the impact be?

A. It would - we would need additional costs - additional support to do that calculation, do that support. So very simple, I would need additional staffing resources, additional staff to actually be dedicated to continuously reviewing the daily activities at the task level. So by default, I would need to recover that cost of the, of the additional overhead to do that analysis.

Q. And in your view, would the level of effort required to do those calculations be proportionate to the benefit that the City obtained?

A. No.¹⁰⁵⁴ [*emphasis added*]

¹⁰⁵⁴ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 46, lines 5 – 32 to p. 48, lines 1 – 13.

981. It is important to note that, as a result of these annual budget reviews, the City's taxi fees are typically adjusted to accurately reflect fluctuation in the City's costs year to year. As Mr. Rogers explained during examination in chief, each department makes their own decisions as to the appropriate increase(s) to be applied for each fee and recommends the increase to City Council for adoption. Council may make changes to the proposed fee increase(s) by way of motion.¹⁰⁵⁵

982. Although each of the City's departments make their own decisions as to the appropriate increase(s) to be applied to each fee, as Mr. Rogers explained, department staff receive key support in conducting these analyses and reviews from the City's Finance Department (which, as noted above, constitutes an indirect cost to the City):¹⁰⁵⁶

MR. POLOWIN: Q. Mr. Rogers, when we left off, we were discussing user fees, and the annual increases in user fees charged under the taxi bylaw as shown in the 2016 budget.

And I would just like to ask, what type of analysis does the finance department undertake for each departmental budget?

A. So during each annual budget process, we do what we would consider a bottom-up build of the budget. We review all of our head count resources, so the FTEs. As an example, for bylaw services, we would have all the details behind every position within bylaw. We would correlate that back to the existing collective agreements, to ensure that any incremental increases, as previously mentioned, from a collective agreement perspective, are put forward and captured for the increase in costs, as an example. We also review various material contracts, so any vendor contracts that we would have. Again, this is globally service wide. If I use winter operations, as an example, we have year-over-year contracts with external providers. We would review those contracts to ensure we capture any incremental inflationary costs, as per the contracts. We also do historical analysis of performance to budget in previous years, which, you know, the sole purpose of that would be identifying any potential outliers. So if there's a significant increase or decrease in the cost through, through that review, we would identify that as a, you know, further review with the client, the department, to ensure that we're aware of what caused that increase, as an example. So we pretty much go line by line in terms of reviewing the existing budget, and then, of course, the existing pressures, compensation-related pressures, market inflationary pressures, changes in service delivery, et cetera, to put forward a budget that represents those increased requirements for existing services.

Q. And is there any assessment undertaken of the user fees?

¹⁰⁵⁵ *Ibid*, at p. 50, lines 22 – 32 to p. 51, lines 1 – 14; see also Exhibit 215, *supra* note 1044, at B-1-14361.

¹⁰⁵⁶ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 55, lines 21 – 28.

A. In that same review, user fees are also reviewed in terms of, you know, if, if the department or service area costs are increasing, those factors would also go into consideration for the increases, such as you have seen on the page right here.¹⁰⁵⁷

983. In the specific case of the City's taxi fees, annual increases have typically been consistent with minimum adjustments for cost of living.¹⁰⁵⁸ Consider, as an example, the following increases to taxi fees, which were applied during the years immediately following the enactment of the 2012 By-law:¹⁰⁵⁹

Category	Fee in \$			% Change over 2014	% Change over 2013
	2013	2014	2015		
New Application					
Taxicab Driver	161.00	164.00	167.00	1.8%	3.7%
Taxi Plate Holders – Standard Taxicab	514.00	524.00	534.00	1.9%	3.9%
Taxi Plate Holder – Accessible Taxicab	514.00	524.00	534.00	1.9%	3.9%
Taxicab Broker – 1 to 24 taxicabs	760.00	775.00	791.00	2.1%	4.1%
Taxicab Broker – 25 to 99 taxicabs	2,327.00	2,374.00	2,421.00	2.0%	4.0%
Taxicab Broker – 100 and more taxicabs	6,836.00	6,972.00	7,111.00	2.0%	4.0%
Renewal Application					
Taxicab Driver	161.00	164.00	167.00	1.8%	3.7%
Taxi Plate Holder – Standard Taxicab	514.00	524.00	534.00	1.9%	3.9%
Taxi Plate Holder – Accessible Taxicab	514.00	524.00	534.00	1.9%	3.9%
Taxicab Broker – 1 to 24 taxicabs	760.00	775.00	791.00	2.1%	4.1%
Taxicab Broker – 25 to 99 taxicabs	2,327.00	2,374.00	2,421.00	2.0%	4.0%
Taxicab Broker – 100 and more taxicabs	6,836.00	6,972.00	7,111.00	2.0%	4.0%
Transfer Plate Holder to Plate Holder	3,800.00	3,876.00	3,954.00	2.0%	4.1%

¹⁰⁵⁷ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 52, lines 3 – 32 to p. 53, lines 15; see also Exhibit 215 *supra* note 1044, at B-1-14361.

¹⁰⁵⁸ See e.g. Tania McCumber, Re-examination, February 7, 2023, *supra* note 518, at pp. 139-140; Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 45, lines 30 – 32 to p. 46, lines 1 – 6, p. 64, lines 30 – 32 to p. 65, lines 1 – 4.

¹⁰⁵⁹ Exhibit 1, Tab 65 *supra* note 904, at F7606; see also Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 141, at p. 107, lines 9 – 24; see also Exhibit 1, Tab 68 *supra* note 598, at, F44.

984. In speaking about the specific increases over 2013 and 2014, Ms. Hartig explained that these annual changes tend to reflect an increase of approximately 2 per cent.¹⁰⁶⁰

985. This baseline adjustment was also referenced during the evidence of Mr. Rogers, who stated that “[i]n the scenario where there could be significant impacts to an existing user fee, beyond your normal two, three percent inflationary pressures as an example”, a “deeper dive” would be required to assess whether “other indicators outside of annual inflationary pressures” require a adjustment to the fees in question.¹⁰⁶¹

986. Once reviewed and (where appropriate) adjusted by City Council, the City goes on to adopt the adjusted taxi fees into the by-law, through the enactment of amending by-laws.¹⁰⁶²

987. Once the City’s annual budget (including its adjusted user fee amounts) is set, the City must proceed to “cash out” each year – in other words, it cannot roll forward prior year deficits or surpluses during future budgeting processes.¹⁰⁶³ Therefore, in circumstances where a service area generates a revenue surplus or deficit against its annual budget, Mr. Rogers explained that the City will address these budget fluctuations using the City’s tax stabilization reserve.¹⁰⁶⁴

G) Taxi fees are set in relation to cost recovery

988. Ultimately, the City’s key objective when setting and adjusting taxi fees (as with all user fees) is to recover its costs associated with the administration and enforcement of the taxi by-law.¹⁰⁶⁵ Staff have

¹⁰⁶⁰ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 107, lines 25 – 32 to p. 108, lines 1 – 27.

¹⁰⁶¹ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 42, lines 4 – 9.

¹⁰⁶² Christine Hartig, Cross-Examination, February 3, 2023, *supra* note 141, at p. 37, lines 11 – 32.

¹⁰⁶³ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 75, lines 23 – 25.

¹⁰⁶⁴ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 72, lines 18 – 32 to p. 73, lines 1 – 24; see also Exhibit 223, Report to Finance and Economic Development Committee and Council, dated February 24, 2014, B-1-14996. **NOTE** – the Finance and Economic Development Committee (FEDCO) is the Committee within the City responsible for the overall financial stewardship of the City and for setting financial policies, etc.; Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 74, lines 8 – 13.

¹⁰⁶⁵ See e.g. Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 141, at p. 101, lines 20 – 29.

consistently advised Council that any fee enacted by the City must be tied to the City's cost in providing services.¹⁰⁶⁶

989. Guided by this objective, City staff must consider a variety of costs (which are discussed in more detail below). In considering these costs and the historical evolution of taxi fees discussed above, it is worth noting that the fee types/categories established under the City's taxi regulations have remained consistent since the harmonization of taxi fees following amalgamation.

990. The historical reports discussed above demonstrate that each fee type/category arose in relation to specific services provided by the City for the administration and enforcement of its taxi by-laws. Of particular note, the above reports detail the specific work undertaken by City staff in relation to each fee type/category.

991. During examination in chief, Ms. Hartig's evidence made clear that these fee types/categories continue to reflect work undertaken by City staff specifically for the administration and enforcement of its taxi regulations. For example, in speaking specifically about the work undertaken in relation to license transfer fees under the by-law (*i.e.* the fees that are applied when a plate licence is transferred between individuals, whether for standard or accessible taxis) Ms. Hartig explained that the City's role is to ensure that the transferee complies with the by-law. This includes conducting an inspection of the vehicle to ensure that the vehicle complies with the requirements stipulated under the by-law, and reviewing the paperwork submitted by the parties to confirm compliance with the by-law, which may require review by legal staff.¹⁰⁶⁷

¹⁰⁶⁶See, eg, Exhibit 53 *supra* note 99, at pp. F2657-F2661; Leslie Donnelly, Examination in Chief, January 26, 2023, *supra* note 102, at p. 63, lines 3 – 30.

¹⁰⁶⁷Christine Hartig, Examination in Chief, February 2, 2023, p. 96, lines 10 – 32 to p. 98, lines 1 – 9, and p. 98, lines 10 – 24; see also Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 98, lines 25 – 32 to p. 99, lines 1 – 21 (in relation to transfer fees upon the death of a plate holder); Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 94, lines 18 – 32 to p. 95, lines 1 – 18 (in relation to renewal application fees for standard taxis); Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 95, lines 19 – 32 to p. 96, lines 1 – 9 (in relation to renewal application fees for accessible taxis); Christine Hartig, Examination in Chief, February 2, 2023 *supra* note 137, at – p. 101, lines 9 – 19 (in relation to replacement or duplicate fees).

992. It is uncontroverted that the City provides services under the 2012 By-law, including administration and enforcement. It stands to reason that these services come at a cost to the City. Ms. Hartig's evidence reinforces that each of the fee types/categories under its taxi regulations are still tied specifically to services it provides.

993. Until these proceedings, the evidence shows that the City's intentions vis-à-vis its taxi fees (*i.e.* cost recovery) have never been questioned or challenged by the plaintiffs, despite evidence confirming the plaintiffs' involvement and consultation with the City regarding taxi fees and annual payment of taxi fees in compliance with the by-law.¹⁰⁶⁸ More importantly, the plaintiffs have never taken the position that the services were never provided.

H) Costs incurred by the City of Ottawa in relation to the administration and enforcement of the 2012 By-law

994. In consideration of the evidence above regarding the history, structure and approach towards taxi licensing fees in the City, the costs incurred by the City in relation to the taxi by-law may be broadly grouped as follows:

- (a) Costs associated with processing applications for taxi licenses and renewals at the City's public counter;¹⁰⁶⁹

¹⁰⁶⁸ Evidence of the plaintiffs' acknowledgement of annual payment of taxi fees: Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 127, lines 19 – 24; Iskhak Mail, Cross-Examination, January 18, 2023, *supra* note 492, at p. 126, lines 30 – 32, p. 127, lines 1 – 5, p. 128, lines 28 – 32 and p. 129, line 1; Yeshitla Dadi, Cross-Examination, January 23, 2023, *supra* note 26, at p. 117, lines 14 – 27; Antoine El-Feghaly, Cross-Examination, January 25, 2023, *supra* note 26, at p. 100, lines 18 – 26 and p. 111, lines 9 – 11. Evidence confirming Plaintiffs' participation in consultations regarding taxi fees and failure to raise concerns regarding the City's cost recovery rationale: Marc André Way, Examination in Chief, January 5, 2023, *supra* note 3, at p. 8, lines 5 – 18, p. 10, lines 4 – 12, p. 11, lines 25 – 32, p. 12, lines 1 – 16, p. 20, lines 21 – 31, p. 22, lines 25 – 32, p. 23, lines 1 – 9, and p. 128, lines 2 – 4; Marc André Way, Cross Examination, January 13, 2023, *supra* note 86, at p. 7, lines 27 – 32.

¹⁰⁶⁹ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 101, lines 24 – 29.

- (b) Costs associated with taxi licence administration (which includes overhead costs associated with maintaining a centralized taxi information system, physical premises, and costs associated with the City's Property Standards and Licence Appeal Committee);¹⁰⁷⁰
- (c) Costs associated with taxi-related policy development and public consultation;
- (d) Costs associated with enforcement of the taxi by-law (which includes staffing, fleet/vehicle, equipment and training costs required to carry out periodic vehicle inspections, investigations into dispatched complaints/service requests, and targeted investigations into unlicensed/bandit taxicab operations); and
- (e) Indirect costs associated with City services that support taxi-related work (which includes, as discussed above, the City's Finance, Human Resources and Information Technology services).

I) Costs Relating to Taxi Licence Processing and Administration

995. In the case of taxi licence administration and processing costs, Ms. Hartig explained that the City incurs costs associated with dedicated taxi resources, such as the City's Taxi Information Management System (TIMS). TIMS is the database where all taxi licensing information is held, and the City has dedicated, expert personnel to manage and update the system from the City's public counter, which operates Monday to Friday from 8:30 am to 4:30 pm.¹⁰⁷¹

996. Ms. Hartig also spoke about the role of the City's Property Standards and Appeal Committee, which contributes to taxi license administration activities by hearing and deciding appeals of the City's licensing decisions (including taxi licensing).¹⁰⁷²

¹⁰⁷⁰ *Ibid* at p. 100, lines 24 – 29.

¹⁰⁷¹ *Ibid* at p. 103, lines 20 – 32 to p. 105, lines 1 – 3.

¹⁰⁷² *Ibid* at, p. 100, lines 24 – 32 to p. 102, lines 1 – 8.

997. In her evidence, Ms. McCumber also elaborated on the costs incurred by the City for license administration and processing. In particular, she noted that, between 2014 and 2016, the City dedicated eight full time staff to license administration and processing. The salaries of these staff members ranged between \$70,000 to \$80,000 (with benefits).¹⁰⁷³

998. In providing these figures, Ms. McCumber also explained that administration of the 2012 By-law occupies significantly more staff time in comparison to other business licensing categories:

Q. And do you know what proportion of their time roughly was dedicated to the administration of the taxi by-law?

A. It varied depending on time of year. Between January and April it's renewal time. So it's constant. It's steady with taxi drivers and plate holders coming into our building to be renewed. And then at that time we had two annual inspections as well that occurred with the taxi cabs. So there's an additional spring and fall where any taxi cab that came through for inspection, that information was required to be entered into our system, uploaded and filed.

Q. All right. And how did the time or how did the time required for the administration of the taxi by-law compare to the time required for administration of other licensing categories?

A. In comparison, it's volume. So the, the — I guess the number of licensees or plate holder and taxi cab driver is quite substantial in comparison to other licensing categories. It's based on the number of driver and plate holders.¹⁰⁷⁴ [*emphasis added*]

II) Costs Relating to Taxi-Related Policy Development

999. In the case of policy development, Ms. Hartig explained that, since amalgamation, taxi-related policy work has been housed within BLRS. As such, the City incurs costs in relation to the salaries of staff who undertake ongoing taxi-related policy work. However, from time to time, City Council may direct that the expertise or independence of an external consultant may be required for taxi-related policy work. This also incurs costs for the City.¹⁰⁷⁵

¹⁰⁷³ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 51, lines 10 – 18.

¹⁰⁷⁴ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 51, lines 16 to p. 52, lines 1 – 4.

¹⁰⁷⁵ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 105, lines 15 – 32 to p. 106, lines 1 – 26; see also Susan Jones, Cross-Examination, February 9, 2023, *supra* note 112, at pp. 160, lines 12 – 20 and p. 161, lines 4 – 7.

III) **Taxi Enforcement Costs**

1000. As Ms. Hartig explained during examination in chief, enforcement of the taxi by-law incurs a variety of costs to the City, including (a) salaries/compensation costs for by-law enforcement officers; (b) fleet/vehicle costs; (c) equipment costs (e.g. radios, uniforms); and (d) training costs.¹⁰⁷⁶

1001. Ms. McCumber echoed Ms. Hartig's evidence, providing estimates for some of the costs incurred by the City for a number of the resources which are required for taxi enforcement. These estimates are summarized in the following table:¹⁰⁷⁷

Required Resource	Average Estimated Cost
<p>By-law Enforcement Officers</p> <ul style="list-style-type: none"> • 3-4 full time officers were dedicated to taxi enforcement in the period 2012 to 2016 	<p>Base salaries:</p> <p>\$90,000 to \$100,000 (with benefits)</p>
<p>Vehicles</p> <ul style="list-style-type: none"> • Generally, 2 vehicles were dedicated to taxi enforcement • BLRS replaces vehicles roughly every 5 years (depending upon vehicle mileage) 	<p>New vehicle purchase:</p> <p>\$30,000 to \$35,000 (varies depending on vehicle type)¹⁰⁷⁸</p> <p>Annual vehicle costs (maintenance, licensing, fuel, rentals)¹⁰⁷⁹:</p> <p>\$12,000 to \$16,000</p>
<p>Equipment</p> <ul style="list-style-type: none"> • Ballistic vests, batons, cell phones, laptops, uniforms, duty bags, radio 	<p>\$5,500 to \$5,600 (annually)</p>

¹⁰⁷⁶ Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 102, lines 17 – 29.

¹⁰⁷⁷ Tania McCumber, February 7, 2023, *supra* note 518, at Examination in Chief, p. 46, lines 9 – 32 to p. 49, lines 1 – 22.

¹⁰⁷⁸ Ms. McCumber noted that the cost of a new vehicle could be as high as \$50,000 in some cases.

¹⁰⁷⁹ In speaking about rentals, Ms. McCumber explained the following: “We have rental vehicles which come from a motor pool within the City of Ottawa where vehicles have been returned from a department and they no longer use them. These vehicles have the decals stripped off of them and then we have the ability, if there's any available, to rent them from our fleet services... Now, the other type of rental is through a rental company, such as Enterprise, where we will rent vehicles through them. Usually it's from regards to our unmarked operations, that because the moment that that vehicle is determined to be, I guess a part of the City of Ottawa, then the vehicle has to be switched. And this happens more often than not where we have a vehicle for a month or two and we have to switch it to a new rental.” Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 48, lines 6 – 23.

• Laptops (replaced every 3 to 5 years)	\$1,500 to \$2,000
• Ballistic vest (replaced every 3 to 5 years)	\$1,200
• Radio	\$5,000

1002. It is important to note, however, that these costs do not account for the additional costs incurred by the City during special investigation projects, such as extensive efforts undertaken by the City to enforce against unlicensed Uber drivers following Uber’s arrival in Ottawa in 2014. As set out above, estimating conservatively, enforcement against Uber cost the City approximately \$3.4 million between 2014 and 2016, over and above its standard costs of administering and enforcing the 2012 By-law.

IV) Support Service Costs

1003. It is also important to note that, in addition to the direct and indirect costs discussed above, there are additional officials within BLRS who assist with the administration and enforcement of the taxi by-law. As Ms. McCumber explained, this includes:

- (a) Herself (as the Program Manager for Licensing, Administration and Enforcement), whose annual salary (with benefits) is approximately \$160,000;
- (b) The Supervisor of By-law Enforcement, whose annual salary (with benefits) is approximately \$120,000; and
- (c) The Chief License Inspector/Director of By-law Services, whose annual salary (with benefits) is approximately \$190,000.¹⁰⁸⁰

1004. Although these officials would typically support the City’s work for all licensing categories under BLRS’s purview (including taxis), as Ms. McCumber explained, during the City’s investigation into

¹⁰⁸⁰ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 52, lines 23 – 32.

unlicensed Uber drivers in the 2014 to 2016 period, almost all of these resources were dedicated to licensing and enforcement of the City's taxi by-law.¹⁰⁸¹

V) Revenue generated by the City of Ottawa from taxi fees

1005. In contrast to the costs incurred by the City above, using Exhibit 222, the following chart highlights the amounts (in actual revenue) collected from taxicab licensees (including plate holders, taxicab brokers, and taxicab drivers) between 2010 to 2016:¹⁰⁸²

Year	Total Actual Expenditures by By-law and Regulatory Services	Actual Revenue from Taxi Fees
2010	\$16,640,723.00	\$1,452,807.00
2011	\$17,515,107.00	\$1,500,181.50
2012	\$18,300,023.00	\$1,368,201.00
2013	\$19,095,664.00	\$1,381,706.43
2014	\$19,540,610.00	\$1,594,016.00
2015	\$19,720,178.00	\$1,376,171.50
2016	\$19,691,360.00	\$1,489,111.50

1006. During examination in chief, Mr. Rogers noted that the revenue generated from taxi fees represents only a “small component” of the City's total revenue for BLRS.¹⁰⁸³ This is evident from the following chart, which also includes data from Exhibit 222 regarding the total revenue generated by BLRS as well as the City's overall operating budget for 2012 to 2016:

¹⁰⁸¹ Tania McCumber, Examination in Chief, February 7, 2023, *supra* note 518, at p. 52, lines 24 – 32.

¹⁰⁸² See Exhibit 222, City of Ottawa By-law Services Budget vs. Actual 2010-2021, F1171. These years were selected for illustrative purposes, to reflect data collected by the City in the years leading up to and following the enactment of the 2012 By-law (*i.e.* the by-law complained of by the plaintiffs in Common Issue 4).

¹⁰⁸³ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 67, lines 1 – 5. See also Christine Hartig, Examination in Chief, February 2, 2023, *supra* note 137, at p. 119, lines 18 – 21.

Year	Revenue from Taxi Fees ¹⁰⁸⁴	Total Revenue Collected by By-law and Regulatory Services ¹⁰⁸⁵	Percentage Portion of Taxi Fee Revenue Compared to Total BLRS Revenue	Total Annual Operating Budget of the City of Ottawa	Percentage Portion of Total Annual Operating Budget of the City of Ottawa
2010	\$1,452,807.00	\$21,652,345.90	6.71%	-	-
2011	\$1,500,181.50	\$22,351,135.94	6.71%	-	-
2012	\$1,368,201.00	\$24,393,672.25	5.61%	\$2,738,000,000 ¹⁰⁸⁶	0.05%
2013	\$1,381,706.43	\$25,273,416.30	5.47%	\$2,832,000,000 ¹⁰⁸⁷	0.05%
2014	\$1,594,016.00	\$24,286,722.40	6.56%	\$2,916,000,000 ¹⁰⁸⁸	0.06%
2015	\$1,376,171.50	\$24,759,690.87	5.56%	\$3,075,000,000 ¹⁰⁸⁹	0.05%
2016	\$1,489,111.50	\$25,088,919.52	5.94%	\$3,169,000,000 ¹⁰⁹⁰	0.05%

1007. From the above, it is evident that the revenue generated by taxi fees constitutes between 5 to 7 per cent of BLRS's total revenue, and constitutes only about 0.05 to 0.06 per cent of the City's overall operating budget.

1008. Fees are distinguished from taxes in that taxes are intended to raise revenue. It is not credible to suggest that the City would levy a tax on taxi licensees for the purpose of raising funds equivalent to 0.05% of its overall budget.

1009. By contrast, the following chart compares the total revenue received by BLRS from parking fines against the same data points (once again using data from Exhibit 222):

¹⁰⁸⁴ Exhibit 222, *supra* note 1082, at F1171.

¹⁰⁸⁵ *Ibid* at F1171.

¹⁰⁸⁶ Exhibit 216, *supra* note 1044, at B-1-10987.

¹⁰⁸⁷ Exhibit 217, *supra* note 1044, at B-1-11777.

¹⁰⁸⁸ Exhibit 218, *supra* note 1044, at B-1-12679.

¹⁰⁸⁹ Exhibit 219, *supra* note 1044, at B-1-13501

¹⁰⁹⁰ Exhibit 215, *supra* note 1044, at B-1-14277.

Year	Revenue from Parking Fines ¹⁰⁹¹	Total Revenue Collected by By-law and Regulatory Services ¹⁰⁹²	Percentage Portion of Parking Fine Revenue Compared to Total BLRS Revenue	Total Annual Operating Budget of the City of Ottawa	Percentage Portion of Total Annual Operating Budget of the City of Ottawa
2010	\$16,494,276.62	\$21,652,345.90	76.2%	-	-
2011	\$17,242,989.31	\$22,351,135.94	77.2%	-	-
2012	\$19,289,716.86	\$24,393,672.25	79.1%	\$2,738,000,000 ¹⁰⁹³	0.71%
2013	\$19,934,706.23	\$25,273,416.30	78.9%	\$2,832,000,000 ¹⁰⁹⁴	0.70%
2014	\$18,687,726.73	\$24,286,722.40	77.0%	\$2,916,000,000 ¹⁰⁹⁵	0.64%
2015	\$19,185,106.61	\$24,759,690.87	77.5%	\$3,075,000,000 ¹⁰⁹⁶	0.62%
2016	\$19,058,570.89	\$25,088,919.52	76.0%	\$3,169,000,000 ¹⁰⁹⁷	0.60%

1010. This data demonstrates that a large majority (over 70 per cent) of BLRS's revenue comes from parking fine revenue. Indeed, Mr. Rogers confirmed this during his evidence, stating that BLRS's "main revenue source" is parking fines.¹⁰⁹⁸

1011. This evidence is significant when considering BLRS's total revenue (budgeted and actual) on a year-to-year basis alongside its annual expenditures (see Exhibit 222 under the Tab titled "Leadsheet V2").¹⁰⁹⁹ The variance in these amounts on an annual basis is summarized in the following chart:

¹⁰⁹¹ Exhibit 222, *supra* note 1082, at F1171.

¹⁰⁹² *Ibid.*

¹⁰⁹³ Exhibit 216, *supra* note 1044, at, B-1-10987.

¹⁰⁹⁴ Exhibit 217, *supra* note 1044, at, B-1-11777.

¹⁰⁹⁵ Exhibit 218, *supra* note 1044, at, B-1-12679.

¹⁰⁹⁶ Exhibit 219, *supra* note 1044, at, B-1-13501

¹⁰⁹⁷ Exhibit 215, *supra* note 1044, at B-1-14277.

¹⁰⁹⁸ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 66, lines 26 – 32 and p. 67, lines 6 – 10.

¹⁰⁹⁹ Exhibit 222, *supra* note 1082, at F1171. See also Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 67, lines 11 – 32 to p. 68, lines 1 – 2.

Year	Net Annual Revenue (Budget vs. Actual) ¹¹⁰⁰	Net Annual Expenditures (Budget vs. Actual) ¹¹⁰¹	Total Net Result (Net Revenue – Net Expenditures)
2010	\$189,532	\$152,932	\$36,600 (deficit)
2011	\$526,547	\$38,728	\$565,276 (deficit)
2012	\$1,053,989	\$250,208	\$803,781 (surplus)
2013	\$1,642,223	\$854,324	\$787,899 (surplus)
2014	\$719,270	\$1,087,772	\$1,807,041 (deficit)
2015	\$621,301	\$68,347	\$689,648 (deficit)
2016	\$889,815	\$61,827	\$827,989 (deficit)

1012. The chart above demonstrates that, in most years, BLRS’s annual budget has generated a net deficit (meaning that the City received less revenue than it budgeted for).¹¹⁰² Again, it is not credible to suggest that the City would levy a tax on taxi licensees simply so that BLRS could continue operating at a deficit.

1013. In years where BLRS has seen a surplus (e.g. 2012, 2013), this has been the result of special circumstances. For example:

- (a) In 2012, BLRS’s surplus was attributed to “higher revenues from increased parking fines”,¹¹⁰³ and
- (b) In 2013, BLRS’s surplus was attributed to “increased parking fine, spay-neuter, business and taxi license revenue, which more than offset increased costs related to the new Private Parking Enforcement program and spay-neuter clinic operations.”¹¹⁰⁴

¹¹⁰⁰ In this column, a red cell signifies that the City experienced a revenue deficit (*i.e.* it received less in actual revenue than it budgeted for). A green cell signifies that the City experienced a revenue surplus (*i.e.* it received more in actual revenue than it budgeted for).

¹¹⁰¹ In this column, a red cell signifies an expense loss to the City (*i.e.* the City expended more than it budgeted for). A green cell signifies savings for the City (*i.e.* the City spent less than it budgeted for).

¹¹⁰² Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 67, lines 25 – 29.

¹¹⁰³ Exhibit 1, Document 2 – Variance Analysis – 2012 Operating Results, F7623.

¹¹⁰⁴ Exhibit 224, Document 2 – Variance Analysis – 2013 Operating Results, B-1-15011.

1014. Historically, however, Mr. Rogers noted that BLRS has observed a close correspondence of actual revenues and projected revenues. As Mr. Rogers explained, this is an indication of appropriate cost recovery.¹¹⁰⁵

3) Analysis

A) The taxi fees under By-law 2012-258 constitute lawful fees imposed by a municipality in accordance with the Municipal Act

1015. On the totality of the evidence detailed above, the plaintiffs' claim that the taxi fees imposed by the City under the 2012 By-law constitute unlawful taxes simply does not hold true. The evidence makes it clear that the City's taxi fees in fact constitute fees that a municipality may lawfully impose pursuant to the *Municipal Act*.

1016. As noted above, a fee will constitute an unlawful tax where the following criteria are met: (a) it is enforceable by law; (b) it is imposed under the authority of the legislature; (c) it is levied by a public body; (d) it is levied for a public purpose; and (e) there is no nexus between the charge and the cost of providing the service or program to those subject to the fee.¹¹⁰⁶

1017. In consideration of the test, the City acknowledges that taxi fees in the City of Ottawa are enforceable by the City's taxi by-laws, imposed under the authority of the legislature, and levied by the City (being a public body). In this sense, there is no question that the first three criteria of the test are met.

1018. However, the inquiry ends there, because the City's taxi fees fail to satisfy the remaining criteria to qualify as unlawful taxes. In other words:

- (a) The City's taxi fees are not levied for a public purpose; and

¹¹⁰⁵ Cyril Rogers, Examination in Chief, February 14, 2023, *supra* note 1033, at p. 70, lines 10 – 32.

¹¹⁰⁶ See generally *Eurig Estate (Re)*, *supra* note 952; *1736095 Ontario Ltd. v. Waterloo (City)*, 2015 ONSC 6541 at [para. 45](#), cited in *Angus*, *supra* note 949 at [para. 29](#).

- (b) A reasonable nexus exists between the taxi fees charged and the costs incurred by the City in relation to the provision of taxi-related services to those who are subject to taxi fees.

I) The City's taxi fees are not intended for a "public purpose"

1019. When considering whether a levy is "intended for a public purpose", the Court will consider whether the funds generated by the fee are deposited into a general revenue account (or whether they are deposited to a specific account).¹¹⁰⁷ However, the mere fact that the funds are deposited into general revenue accounts is not determinative of the question of whether the levy is intended for a public purpose. The Ontario Superior Court of Justice addressed this very circumstance in the case of *1736095 Ontario Ltd. v. Waterloo (City)*.¹¹⁰⁸

1020. In *1736095 Ontario Ltd. v. Waterloo (City)*, the City of Waterloo passed a municipal by-law introducing a program requiring "landlords of most low-rise rental units to obtain a rental housing license, renewable annually, and to pay the prescribed license or renewal fee to the City".¹¹⁰⁹ The funds from these fees were deposited into the municipality's general revenue account, "which helps fund the cost of the licensing regime."¹¹¹⁰ The evidence also showed that net surpluses generated from program funds were also deposited into general revenue accounts.¹¹¹¹

1021. Nevertheless, this evidence did not prevent the Court from concluding that the levy in question was a lawful fee. Rather, the Court found that "the licensing fees contemplated by By-law 047 are not intended for a public purpose but rather for a very specific purpose, i.e. to regulate general housing licensing including rental townhouse units in the City of Waterloo."¹¹¹²

¹¹⁰⁷ *Urban Outdoor Trans Ad, a Division of Slight Communications Inc. v. Scarborough (City)* (2001), 2001 CarswellOnt 187 (Ont. CA) at para. 33. In this case, the Ontario Court of Appeal held that the fee in question was not an unlawful tax. In so doing, the ONCA noted that the funds received by the municipality were kept separate from the municipality's general revenue accounts.

¹¹⁰⁸ *1736095 Ontario Ltd. v. Waterloo (City)*, *supra* note 954.

¹¹⁰⁹ *1736095 Ontario Ltd. v. Waterloo (City)*, *supra* note 954 at [para. 11](#).

¹¹¹⁰ *1736095 Ontario Ltd. v. Waterloo (City)*, *supra* note 954 at para. 50.

¹¹¹¹ *1736095 Ontario Ltd. v. Waterloo (City)*, *supra* note 954 at para. 60.

¹¹¹² *1736095 Ontario Ltd. v. Waterloo (City)*, *supra* note 954 at para. 70.

1022. As in *1736095 Ontario Ltd. v. Waterloo (City)*, the evidence in the instant case (and detailed above) establishes that the taxi fees under the 2012 By-law are intended for a very specific purpose, *i.e.* to regulate taxicab licensing in the City of Ottawa, and to recover the City's costs associated with same. For this reason alone, the City's taxi fees are lawful.

1023. However, despite the overwhelming evidence in support of the City's intentions and objectives *vis-à-vis* cost recovery, the plaintiffs argue that there is "no relationship" between the City's taxi fees and the cost of administering and enforcing the taxi by-law.¹¹¹³ To illustrate this point, the plaintiffs rely exclusively upon evidence of the enactment and development of the City's plate transfer fee, which at one time was calculated at 10 per cent of plate values in the City (up to a maximum of \$5,800). This exclusive focus on the plate transfer fee was evident on cross-examination of the representative plaintiff, Mr. Way, who agreed that the \$3,800 plate transfer fee is the only fee which he considers an unlawful tax because it had not been well explained to him.¹¹¹⁴

1024. The plaintiffs' focus on the plate transfer fee to support this argument is a red herring.

1025. First, as demonstrated above, although the amounts set under the City's taxi regulations have been reviewed and adjusted over the years, the reasons justifying each taxi fee type/category (including the plate transfer fee) trace back to the pre-amalgamation period. Each were proposed specifically to address the City's ongoing services and activities in furtherance of the administration and enforcement of the taxi by-law.

1026. Second, in the case of the transfer fee specifically, the evidence shows that this fee was a practical carryover from the Former City during the harmonization of taxi fees. The 10% formula was proposed by City staff during a period of transition, in an effort to harmonize plate transfer fees from the Former Cities. Unlike in the case of other taxi fees at the time, the evidence above shows that there was

¹¹¹³ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 488.

¹¹¹⁴ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at paras. 484-488; Marc André Way, Cross-Examination, January 13, 2023, *supra* note 86, p. 23, lines 10 – 18, p. 26, lines 16 – 20 and p. 29, line 32 to p. 31, lines 1 – 25.

high discrepancy in the fee amounts set in each of the Predecessor Cities in relation to processing plate transfers. Therefore, the 10% formula adopted by the City presented an equitable and practical solution for recovering costs during the transition period.

1027. Third, the 10% transfer fee is no longer in force (eliminated in 2005), and is not at issue in this action. Its use was transitory, and it was eliminated in favour of a significantly lower fixed fee under the 2005 By-law that better reflected the City's cost recovery objectives. This elimination is evidence of the City actively ensuring a nexus between the fees charges under its taxi by-laws, and its costs of providing services.

II) There is a reasonable nexus between the taxi fees charged and the costs incurred by the City for administration and enforcement of the 2012 By-law

1028. The evidence also establishes a nexus between the fees charged and the costs incurred by the City in relation to the administration and enforcement of the taxi by-law. In particular, the extensive budget documentation tendered by the City and discussed by the City's witnesses (particularly Ms. Hartig and Mr. Rogers) demonstrates close correspondence the City's actual annual revenue against its actual incurred expenditures on a yearly basis.

1029. The City does not generate surplus revenue as a result of the taxi fees set under the 2012 By-law. Rather, the fact is that the revenue generated by the City from taxi fees constitutes only a small fraction of BLRS's overall revenue. Indeed, the evidence shows that the largest source of the City's revenue is generated from parking fees.

1030. The significance of this is further underscored when considered in the context of the City's overall operating budget. From the evidence above, it is clear that the contribution made by taxi fees to the City's overall operating budget is minute. Taxi fees are simply not a revenue generating exercise for the City in any significant way (particularly when compared to other sources of revenue for the City, such as parking fines).

1031. The City's detailed budget documentation and the evidence of the City's witnesses go beyond mere "statements of intent and reports containing no values or monetary comparisons".¹¹¹⁵ These figures come from City staff who are directly involved in the administration and enforcement of the City's taxi by-law, and therefore are directly knowledgeable about the City's expenditures in relation to same.¹¹¹⁶

1032. As such, contrary to the plaintiffs' assertion, this is not a case where the City has not tendered any evidence of its costs related to the 2012 By-law, which was the case in *Angus v. Corporation of the Municipality of Port Hope*.¹¹¹⁷ In *Angus*, the municipality (*i.e.* the Corporation of the Municipality of Port Hope), led evidence that contained "no hard data, calculations or cost estimates and analysis" for the Court to consider, despite being afforded additional opportunity to produce further evidence by the Court.¹¹¹⁸ The Court found this to be insufficient to discharge the municipality's burden to establish a nexus, and hence concluded that the impugned fees constituted an unlawful tax.¹¹¹⁹

1033. Indeed, *Angus* is evidence of the remarkably high bar required for the Court to find that a fee is unlawful.

1034. By contrast, the evidence led by the City through its historical reports, budget documents and witnesses provide hard data, calculations, cost estimates and analysis regarding the City's costs in relation to the administration and enforcement of the taxi by-law. Although much of this information is reported at a Branch-level, as noted above, the City is not obligated to tender evidence of a more exact accounting. Therefore, the above is sufficient to establish a reasonable connection between the City's taxi fees and the costs associated with the City's taxi licensing activities.

¹¹¹⁵ See *Angus*, *supra* note 949 at paras. 33 and 34.

¹¹¹⁶ See *e.g.* Tania McCumber, Cross-Examination, February 7, 2023, *supra* note 518, at pp. 132-135.

¹¹¹⁷ *Angus*, *supra* note 949 at para. 48.

¹¹¹⁸ *Angus*, *supra* note 949 at paras. 5-12.

¹¹¹⁹ *Angus*, *supra* note 949 at paras. 32-43.

B) The City's approach to setting and reviewing taxi fees satisfies the requirements placed upon municipalities for a costing analysis

1035. The evidence demonstrates that the City uses a high-level approach for review and consideration of its user fees (including taxi fees), thereby considering its expenses at a Branch-level (rather than at a granular, activity level). This is sufficient to satisfy the City's obligations to demonstrate a nexus between its taxi fees and the costs associated with the administration and enforcement of the taxi by-law.

1036. Nevertheless, the plaintiffs boldly state that no costing analysis was ever carried out by the City¹¹²⁰ and that the City does not track the specific costs of administering the taxi by-law.¹¹²¹

1037. In so doing, the plaintiffs highlight evidence of costing analyses completed by other municipalities,¹¹²² arguing that:

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 do for other types of fees. There is no plausible explanation why such an analysis was not done here."¹¹²³

1038. In support of this argument, the plaintiffs point to the following documents:

- (a) Exhibit 226, which contains a review of development application fees by the City of Toronto;¹¹²⁴
- (b) Exhibit 227, which contains a review of building and planning fees by the Municipality of New Tecumseh;¹¹²⁵ and
- (c) Exhibit 228, which contains a review of all user fees for the City of Milton.¹¹²⁶

¹¹²⁰ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11 at paras. 458-59 and 464-73.

¹¹²¹ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11 at paras. 460-63.

¹¹²² Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11 at para. 472.

¹¹²³ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11, at para. 473.

¹¹²⁴ Exhibit 226, City of Toronto Development Application Fee Review, dated May 13, 2022.

¹¹²⁵ Exhibit 227, Municipality of New Tecumseh Fee Review, dated February 4, 2019.

¹¹²⁶ Exhibit 228, 2022 User Fees Review Study – Town of Milton.

1039. The plaintiffs go on to cite the City's witness, Mr. Rogers, for the proposition 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."¹¹²⁷

1040. The plaintiffs' arguments are fundamentally flawed. The plaintiffs ignore the entirety of the City's evidence discussed above, all of which demonstrates that the City has always informed the setting, review and adjustment of its taxi fees through the ultimate objective of full cost recovery. Indeed, through the following, the City has clearly proffered evidence of robust cost analysis:

- (a) Evidence of the historical reports which were used to establish the baseline fee amounts under the 2012 By-law and the rationale for each taxi fee type/category;
- (b) Evidence from the City's witnesses of the ongoing work undertaken by the City in relation to these taxi fee types/categories, demonstrating that the fee types/categories continue to reflect and relate directly to costs incurred by the City for the administration and enforcement of the by-law. It is worth also noting that the representative plaintiff, Mr. Way, expressly agreed on cross-examination that the City incurs these costs in relation to the administration and enforcement of the taxi by-law;¹¹²⁸
- (c) Evidence of the City's methodology for setting and reviewing user fees, and in particular its use of the Framework and User Fee Policy, to inform the periodic review and adjustment of user fees (including taxi fees) to ensure full cost recovery; and
- (d) Evidence of the City's publicly available annual budget documents and analyses, detailing the following:

¹¹²⁷ Plaintiffs' Closing Submissions, dated April 6, 2023, *supra* note 11 at para. 467.

¹¹²⁸ Marc André Way, Cross-Examination, January 13, 2023, , *supra* note 86, at p. 27, lines 1 – 32, p. 28, lines 1 – 6 and lines 13 – 32, and p. 29, lines 1 – 6.

- Budgeted and actual revenue received from each licensing category (including taxi licensing);
- Budgeted and actual expenditures in relation to each of the City's departments/service areas, including BLRS (which is responsible for the administration and enforcement of the City's taxi by-law); and
- Annual adjustments to user fee schedules (including adjustments to taxi fees).

1041. This evidence shows that the City does in fact perform full costing analyses in relation to the administration and enforcement of the taxi by-law – although perhaps not to the level of granularity preferred by the plaintiffs. This, notwithstanding the fact that the plaintiffs have never raised concerns with the City's costing approach prior to these proceedings.

1042. With that stated, it is also important to note that the level of granularity demanded by the plaintiffs is not in fact required at law. As noted above, Canadian courts do not require municipalities to provide evidence of exact accounting. The plaintiffs are therefore misrepresenting both the evidence and the evidentiary burden that the City is required to meet.

1043. Further, the City has provided reasonable explanations as to why preparing a more granular costing is not appropriate for the City. On this point, the evidence of the City's witnesses (Mr. Rogers, Ms. Jones, Ms. Hartig and Ms. McCumber above) was consistent, and best summarized by Mr. Rogers, who spoke about this issue from his perspective as an accountant with extensive knowledge and understanding of general accounting principles. In particular, Mr. Rogers explained that the City's ability to conduct a detailed analysis of taxi costs (and the accuracy of same) is questionable and likely very difficult, given the complexities associated with allocating BLRS's indirect costs and parsing out BLRS's activities and functions according to licensing category.

1044. This raises a real concern as to whether the granular costing exercise expected by the plaintiffs is even possible. Alternatively, even if possible, such an exercise would undoubtedly incur higher costs

for the City, raising concerns about the proportionality of increasing costs simply for the purpose of generating a line-by-line accounting of the City's costs. Indeed, the type of specific costing advocated by the plaintiffs would likely lead to an increase in their user fees, and the City would need to recover the costs of the costing exercise.

1045. Ultimately, courts will not look behind the methodology employed by the City, nor will they question the assumptions made, focusing instead on the City's intentions. The plaintiffs' evidence that three other municipalities have adopted different costing approaches is insufficient to outweigh this broad deference.

1046. However, on this point, it is also important to note that the plaintiffs' reliance upon evidence of fee analyses completed by other municipalities is also unhelpful for determining whether the City can complete a detailed analysis of its taxi fees. As Mr. Rogers explained in the case of the analyses completed by the City of Toronto and the Municipality of New Tecumseh:

Q. And just at the end of your evidence there, you were speaking to Ms. Sandilands about how a review of development application fees is different from a costing analysis perspective from the analysis that would be done to determine the cost of enforcing a single bylaw licencing category. Can you just expand on that?

A. I think, specifically, as I cited, you know, a bylaw officer may touch on a multitude of different activities and services throughout their eight hour shift. That would vary day-to-day, week to week, month to month, et cetera. From a planning perspective, they're more centrally focused on a set of, you know, responsibilities, if you will. So it's more defined in terms of the allocation of their direct costs to specific fees.

Q. And, and how would the level of administrative effort differ, if at all, as between those two exercises?

A. Specifically, you know, the time - the, the planning process department is probably more rigid in terms of their daily activities based on uniqueness of applications and reoccurrences, versus the variability of the variety of services that bylaw would, would provide, and what that officer would be involved in on a day-to-day basis.

Q. All right. And are you aware of whether the City of Toronto has conducted a review of its taxi licencing fees?

A. No, I'm not.

Q. And Ms. Sandilands also asked you about the study from New [Tecumseh]. Again, have you ever seen that study prior to today?

A. No, I haven't.

Q. And have you ever reviewed the City of [Tecumseh's] user fee policy?

A. No, I have not.¹¹²⁹

1047. In the case of the analysis completed by the City of Milton, Mr. Rogers also gave the following evidence:

Q. All right. And in turning to the study in Milton. Ms. Sandilands informed you that Milton has a population of about 110,000 people, and you spoke about how the relative sizes of Ottawa versus Milton would impact the overhead. What impact, if anything, would the size of Ottawa relative to Milton have on the burden required to undertake the exercise that Milton undertook?

A. So obviously the larger the organization, the larger the infrastructure, the administrative support, very likely the variety of different services that a city, like the City of Ottawa with over a million people would provide, in comparison to Milton, which is just over a hundred thousand, whatever you quoted there. So the broader you grow, the most administratively burden that would entail in developing the overhead costs.

As an example, you know, there's not a direct correlation between a finance resource supporting a size of an organization of A versus B. At some point in time, obviously, your administrative support needs to grow. It may not necessarily be one to one. So it's very hard when you compare non-comparators.

Typically for me, when I do comparisons, we typically look at municipalities that are more relevant in terms of size, scope, service in terms of doing that analysis and benchmarking, if we do reference other municipalities.¹¹³⁰

1048. Mr. Rogers' evidence demonstrates that, by relying on these examples of fee reviews in other municipalities, the plaintiffs are attempting to compare apples to oranges to suggest that a detailed accounting of the City's taxi fees is required. The reality, however, is that attempting such an exercise would be disproportionately burdensome on the City, and would result in little additional benefit overall.

1049. Therefore, the evidence presented by the City is sufficient to demonstrate that it has met its obligations pursuant to the *Municipal Act*. If the Court finds otherwise, this would be inconsistent with the deference afforded to municipalities vis-à-vis their methodology for setting and reviewing user fees. Further, given the evidence above that the City's approach to reviewing user fees on an annual basis is

¹¹²⁹ Cyril Rogers, Re-Examination, February 14, 2023, *supra* note 1033, at p. 145, lines 10 – 32 to p. 146, lines 1 – 20.

¹¹³⁰ Cyril Rogers, Re-Examination, February 14, 2023, *supra* note 1033, at p. 146, lines 21 – 32 to p. 147, lines 1 – 23.

consistent with other municipalities in Canada, it would also establish a new precedent for constituents across Canada who may seek to recover fee amounts they have paid for municipal services, undoubtedly leading to user fees being litigated across the country. To avoid this litigation risk, municipalities (including the City) would be required to incur increased administrative costs to adopt a granular, line-by-line analysis of all their user fees moving forward.

1050. In the alternative, if the Court accepts the plaintiffs' arguments and concludes that the City ought to have conducted a granular analysis of its taxi-related costs, the City submits that the Court should order that the City proceed with conducting such an analysis and that the parties should be bound by the results of the revised costing exercise. In other words, if the exercise reveals that the City's full costs associated with the administration and enforcement of its taxi by-laws (including the costs associated with conducting a granular analysis of the taxi fees) are greater than or less than the revenue it generates from taxi fees, the taxi fees should be adjusted accordingly to reflect the City's full costs. Under that alternative scenario, the City would, in turn collect or return amounts charged to the plaintiffs (as the case may be) in accordance with the revised fee amounts.

C) The plaintiffs' claim pursuant to Common Issue 4 is statute-barred

1051. The City also notes that the plaintiffs' claim under Common Issue 4 is statute-barred.

1052. As noted above, the 2012 By-law (which adopted the fees complained of by the plaintiffs) was enacted on July 11, 2012. More than four years later, on August 12, 2016, the plaintiffs initiated these proceedings against the City (which included their claim that the taxi fees collected by the City pursuant to the 2012 By-law constituted an illegal tax).

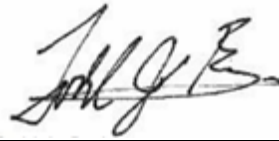
1053. The evidence discussed above demonstrates that the levies set out under the 2012 By-law are lawful fees, charged in accordance with the *Municipal Act*. However, even if the plaintiffs could prove that the fees constituted an unlawful tax, the plaintiffs' ought to have brought an application to quash the 2012 By-law within the one-year limitation period stipulated under section 273 of the *Municipal*

Act.¹¹³¹ This would have prevented the City from incurring the windfall profits complained of by the plaintiffs.

1054. In the alternative, the plaintiffs' claim for restitution and return of amounts paid are subject to the general two-year limitation period set out under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.¹¹³² Therefore, the plaintiffs' claim for restitution is also statute-barred.

1055. In the further alternative, if the Court finds that the plaintiffs are entitled to restitution despite their delay in initiating this claim, the City submits that the plaintiffs should only be entitled to recover amounts paid within two years of the initiation of the action (*i.e.* any and all taxi revenues collected between August 21, 2014 to August 12, 2016).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of May, 2023.



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¹¹³¹ *Municipal Act, 2001*, S.O. 2001, c. 25, s. 273(5).

¹¹³² *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1 at paras. 13, 59

SCHEDULE “A” – LIST OF AUTHORITIES

OVERVIEW OF THE FACTS

1. *Metro Taxi Ltd. v City of (Ottawa)*, [2018 ONSC 509](#).
2. *Municipal Act, 2001*, [S.O. 2001, c. 25](#), ss. [8-10](#), [106](#), [151](#), [156](#), [391](#), [394\(1\)\(c\)](#).
3. *City of Ottawa Act, 1999*, [S.O. 1999, c. 14, Sched. E.](#), s. [5\(1\)](#).
4. *Unifor, Local 1688 v. The City of Ottawa*, [2018 ONSC 3377](#).
5. *Friends of Lansdowne Inc. v. Ottawa (City)*, [2012 ONCA 273](#).

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6. *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](#).
7. *Eisenberg v. Toronto (City)*, [2019 ONSC 7312](#).
8. *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992 CanLII 105 \(SCC\)](#).
9. *Cooper v. Hobart*, [2001 SCC 79](#).
10. *Edwards v. Law Society of Upper Canada*, [2001 SCC 80](#).
11. *Rausch v. Pickering (City)*, [2013 ONCA 740](#).
12. *Williams v. Toronto (City)*, [2016 ONCA 666](#).
13. *R. v. Imperial Tobacco*, [2011 SCC 42](#).
14. *Taylor v. Canada (Attorney General)*, [2012 ONCA 479](#).
15. *Vlanich v. Typhair*, [2016 ONCA 517](#).
16. *Kamloops v. Nielsen*, [1984 CanLII 21 \(SCC\)](#).
17. *Ingles v. Tutkaluk Construction Ltd.*, [2000 SCC 12](#).
18. *Mortimer v. Cameron (1994)*, [1994 CanLII 10998 \(Ont CA\)](#).
19. *118143 Ontario Inc. v. City of Mississauga*, [2015 ONSC 3691](#).
20. *City of Ottawa Act, 1999*, [S.O. 1999, c. 14, Sched. E.](#)
21. *Saulnier v. Royal Bank of Canada*, [2008 SCC 58](#).
22. *Foster (Re)*, [1992 CanLII 7428 \(Ont. Gen. Div.\)](#).
23. *Unifor, Local 1688 v. The City of Ottawa*, [2018 ONSC 3377](#).
24. *City of Toronto Act, 2006*, [S.O. 2006, c. 11, Sched. A.](#)
25. *Municipal Act, 2001*, [S.O. 2001, c. 25](#).
26. *Aylmer Meat Packers Inc. v. Ontario*, [2022 ONCA 579](#).

27. *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, [2013 BCCA 34](#).
28. *Wu v. Vancouver (City)*, [2019 BCCA 23](#).
29. *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, [2009 ONCA 326](#).
30. *Flying E Ranche Ltd. v. Attorney General of Canada*, [2022 ONSC 601](#).
31. *Charlesfort Developments Ltd. v. Ottawa (City)*, [2021 ONCA 410](#).
32. *Thériault et al v. Lanthier et al*, [2010 ONSC 655](#).
33. *Foodinvest Limited v. Royal Bank*, [2018 ONSC 7742](#).
34. *118143 Ontario Inc. (Canamex Promotions) v. Mississauga (City)*, [2016 ONCA 620](#),
35. *Nelson (City) v. Marchi*, [2021 SCC 41](#).
36. *Freitag v. Penetanguishene (Town)*, [\[2005\] O.J. No. 4019 \(Ont. Div. Ct.\)](#).
37. *Suprun v. Bryla*, [\[2007\] O.J. No. 4951 \(Ont. Sup. Ct.\)](#).
38. *Sapone v. Clarington (Municipality)*, [2001 CarswellOnt 5905 \(Ont. Sup. Ct.\)](#).
39. *Polai v. City of Toronto*, [1969 CanLII 33 \(Ont. CA\)](#), aff'm [1972 CanLII 22 \(SCC\)](#).
40. *Donnell v. Joseph*, [2012 ONCA 240](#).
41. *Foley v. Shames*, [2008 ONCA 588](#).
42. *Vlanich v. Typhair*, [2014 ONSC 6245](#).
43. *City of Toronto v. Uber Canada Inc. et al.*, [2015 ONSC 3572](#).
44. *Abdullah v. Maziri*, [2016 ONSC 2168](#).

COMMON ISSUE 3

45. *Andrews v. Law Society of British Columbia*, [1989 CanLII 2 \(SCC\)](#).
46. *R. v. Sharma*, [2022 SCC 39](#).
47. *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#).
48. *R. v. C.P.*, [2021 SCC 19](#).
49. *Kahkewistahaw First Nation v. Taypotat*, [2015 SCC 30](#).
50. *Symes v. Canada*, [1993 CanLII 55 \(SCC\)](#).
51. *Begum v. Canada (Citizenship and Immigration)*, [2018 FCA 181](#).
52. *Withler v. Canada (Attorney General)*, [2011 SCC 12](#).
53. *Ontario Teacher Candidates' Council v. The Queen*, [2021 ONSC 7386](#).
54. *R. v. Oakes*, [1986 CanLII 46 \(SCC\)](#).

55. *R. v. Brown*, [2022 SCC 18](#).
56. *The Adult Entertainment Association of Canada v. Ottawa (City)*, [2007 ONCA 389](#).
57. *Carter v. Canada (Attorney General)*, [2015 SCC 5](#).
58. *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013 SCC 11](#).
59. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#).
60. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#).
61. *R. v. Appulonappa*, [2015 SCC 59](#).
62. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007 SCC 27](#).
63. *Brothers Real Estate Ltd. v Ottawa (City)*, [2020 CanLII 41841 \(ON LPAT\)](#).
64. *Peel Law Association v. Pieters*, [2013 ONCA 396](#).
65. *Addai v. Toronto (City)*, [2012 HRTO 2252](#).

COMMON ISSUE 4

66. *Municipal Act, 2001*, [S.O. 2001, c. 25](#), ss. [17](#), [273\(5\)](#), [391\(1\)\(a\)](#), [394\(1\)](#).
67. *Angus v. Corporation of the Municipality of Port Hope*, [2016 ONSC 3931](#).
68. *Eurig Estate (Re)*, [1998 CanLII 801 \(SCC\)](#).
69. *1736095 Ontario Ltd. v. Waterloo (City)*, [2015 ONSC 6541](#).
70. *Urban Outdoor Trans Ad, a Division of Slight Communications Inc. v. Scarborough (City)*, [2001 CarswellOnt 187 \(Ont. CA\)](#).
71. *Greater Toronto Apartment Association v. Toronto (City)*, [2012 ONSC 4448](#).
72. *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007 SCC 1](#).

SCHEDULE “B” – SUMMARIES OF WITNESS TESTIMONY

MARC ANDRÉ WAY

Nature of Witness: Plaintiff Witness, Fact (Representative Plaintiff)

Testimony Date(s): January 4-6, 9-13 and 17, 2023

The representative plaintiff Marc André Way, is a key figure in the Ottawa taxi industry. He is the President and 50% shareholder of the plaintiff broker, Metro, which operates as Capital Taxi (“Capital”). He is the single largest plate holder in Ottawa, holding 99 taxi plate licenses, either personally or through a wholly-owned corporate entity. These 99 taxi plate licenses represent 8.3% of all plates in circulation in the City of Ottawa. He is the CEO and 80% owner of Coventry Connections, which is the only dispatcher in Ottawa, and which provides dispatch services to the three plaintiff brokers: Capital Taxi, Blue Line, and Westway. Coventry holds 63 plates, representing a further 5.3% of all plates issued in the City. Coventry also provides dispatching services in a number of other municipalities across Ontario.

Mr. Way inherited and expanded his family’s taxi empire. Mr. Way’s maternal grandfather, Claude Thivièrge started Capital in the former City of Eastview (subsequently renamed Vanier) in 1937. Upon Claude’s death, Capital was taken over by Mr. Way’s uncle, Paul Thivièrge. Capital eventually became the dominant taxi company in Vanier. Prior to the amalgamation of the City of Ottawa, Capital regularly applied for taxi plates licenses, which, at that time, were issued by the municipality for nominal value. When amalgamation took place, 38 of these Vanier plates were converted to City of Ottawa plates. Capital also held multiple plates in the former cities of Ottawa and Gloucester prior to amalgamation. These plates were converted into City of Ottawa plates at amalgamation.

After earning a degree in business administration from the University of Ottawa, Mr. Way decided to stay in the family business. He became the General Manager at Capital around 1990, and eventually took over control of the company with the vision to expand the company and enlarge the taxi fleet. He worked with his uncle until his uncle’s death in 2014, when he became a co-owner of Capital with his cousin, Claude Thivièrge.

In 2010, Mr. Way became the President of the Canadian Taxi Association, an organization created to lobby the government for the interests of the taxi industry, a role he still holds today. He has also served on the Executive Committee of the International Taxicab, Limousine and Paratransit Association for three years, and is a member of the International Association of Taxicab Regulators.

In addition to his involvement in the taxi industry, Mr. Way also owns several other companies that operate in the areas of airport services, real estate, and vehicle leasing for taxi drivers. He started a limousine company with seed money from his uncle, which has since expanded by purchasing other limousine companies over time.

Mr. Way understands and agrees that a taxi plate is an inherently speculative asset, akin to an agricultural quota. He agrees that the City plays no role in determining the value at which taxi plates are transferred between private parties, and that such transfers are conducted on a “buyer beware” model. Mr. Way was aware that, at all material times, the by-laws of the City and its predecessor municipalities stated that the municipality retained ownership of taxi plates. He was aware of reports commissioned by the Regional Municipality of Ottawa Carleton in 1988, 1989 and 2000 that stated that taxi plates remain the property of the issuing municipality, and that the municipality has no duty to compensate plate holders for regulatory changes that lead to a reduction in the value of taxi plates.

Mr. Way agreed that neither he, nor any of the plaintiffs, have made any investment in the regulatory regime beyond compliance with the requirements of the City’s taxi by-law. He agreed that no City officials ever directed him to make specific investments in the regulatory regime, or in the taxi industry. He did not identify any specific representations from City officials reflecting any specific commitment to enforce the City’s by-laws against Uber. Likewise he could not identify any representation by the City of Ottawa that it would protect the value of taxi plates.

Mr. Way says that the relationship between the City and the taxi industry was once cooperative and collaborative, especially in relation to enforcement efforts against bandit cabs. However, Mr. Way only

identified two specific occasions on which he provided information leading to enforcement actions against bandit cabs.

After Uber began operating in Ottawa, Mr. Way hired Triangle Investigations to investigate Uber. Triangle encountered the same challenges as the City encountered in undertaking these efforts, including dealing with software, presumably deployed by Uber, designed to identify and block the accounts of enforcement officials.

Mr. Way identified a number of tactics that, in his view, the City should have employed to circumvent Uber's technological advantages, including: using "burner phones," using new credit cards that were not linked to the City; and avoiding triggering geofencing. The City's enforcement officers employed all of these tactics. Ultimately, Mr. Way believes that anything less than an outright ban and elimination of Uber from Ottawa constituted a failure to enforce on the part of the City. Mr. Way acknowledges that many PTC drivers come from the same racial and ethnic backgrounds as current taxi drivers.

Mr. Way was extensively involved in consultations with both the City and KPMG throughout the course of the vehicle for hire (VFH) Review. As CEO of Coventry, he retained a lobbyist, Jeff Polowin, who lobbied City councilors and senior officials extensively between October 2014 and the coming into force of the 2016 By-law. Mr. Way attended a number of these meetings, though he did not register as a lobbyist. Mr. Way also met directly with KPMG on a number of occasions, and was involved in the preparation of a highly detailed submission from Coventry to KPMG, submitted as part of the VFH Review in October, 2015. That submission: (1) made the case for a complete ban on Uber; and (2), in the alternative, outlined 33 specific policy recommendations. Mr. Way took several inconsistent positions as to whether these recommendations were considered in the VFH Review, eventually admitting that a number of the recommendations were included in KPMG's Final Report and the 2016 Staff Report. Finally, Mr. Way appeared before the Community and Protective Services Committee on April 7, 2016, where he made a presentation, and then fielded questions from councilors for approximately 40 minutes.

Between 2018 and 2022, Mr. Way increased his holdings of taxi plates, partly as an investment vehicle, and partly because of his belief in the plates. Out of the entire plaintiff class, Mr. Way would receive the greatest financial benefit from the plaintiffs achieving a successful outcome.

ZIAD MEZHER

Nature of Witness: Plaintiff Witness, Fact

Testimony Date(s): January 17-18, 2023

Ziad Mezher is a class member who provided testimony as a fact witness at trial. Mr. Mezher drives a taxi and holds one taxi plate license.

Mr. Mezher arrived in Canada from Lebanon when he was 24 years old. Currently 57 years old, he has lived most of his adult life in Ottawa where he and his wife own a home and have raised their three children who have now graduated from university. His adult son is employed by a successful international technology company owned by Mr. Mezher's nephew and his other two children hold government jobs. Members of his extended family also live in Ottawa; some own multiple properties and even sit on the condominium board for a building where Mr. Mezher once lived prior to selling his own property.

Born in Lebanon in 1965, Mr. Mezher's father worked in the oil sector while his mother was a stay at home parent to him and his eight siblings. Their family began to experience the impacts of the civil war in 1977 when the conflict and ongoing tensions between Muslims and Christians reached all parts of the country. Mr. Mezher recalls that during a mass movement of Christians from the South to the West of Beirut, his family was forced to leave their home village before it was destroyed.

In Lebanon, Mr. Mezher periodically attended school up to grade 12 and later worked in construction, furniture, and as a gas station attendant. Mr. Mezher shared a small apartment in Beirut with his brother while attending college, but left Lebanon before finishing his degree. His brother, who now works as a statistics professor at the University of Ottawa, was the first to leave for Canada where he secured a job with Canadian government and was eventually able to sponsor Mr. Mezher and his brother.

Mr. Mezher arrived in Ottawa in 1989 where he began working overnight shifts at a local bakery and eventually at a grocery store. He attended school to learn English during this time and picked up a

cleaning job on the weekends to make enough money to sponsor more of his family come to Canada. He was successful in sponsoring his brother in 1990 and then his parents in 1992, by which time he was working a labour-intensive warehouse job making \$15/hr. Soon after, he started working at gas stations in Orleans and Kanata. Between 1993 and 2000, he became the manager at the Orleans location and sponsored his now-wife to come to Canada.

His first child was born in 1994 and he had three children by the time he decided to enter the taxi industry in 2001. He wanted more flexibility and control over his working hours in order to spend more time with his family and to support his wife to attend school and, based on what he was told from those in the industry, this career change would provide that. His wife initially worked as a school bus driver for their children's school, and after completing a two-year college program, she now works for the Canadian Revenue Agency.

In 2001, after completing the taxi training courses through Algonquin College and obtaining a taxi license, Mr. Mezher rented a plate and began driving under the Capital Taxi banner in Gloucester where he worked long hours but would stay at home with his children while awaiting trip requests through dispatch. In 2003, two years after entering the taxi industry, he purchased a taxi plate license for \$50,000, but continued to operate the plate he rented from Capital; instead, he rented out his newly acquired plate to another driver which offset his own plate costs entirely. Mr. Mezher financed the purchase through an informal lending arrangement with his brother-in-law that did not impose payment terms or deadlines.

During his time in the taxi industry, Mr. Mezher described his interactions with by-law enforcement officers as negative, suggesting that that he was treated unfairly. He claimed that the two officers he dealt with would abuse their power by finding arbitrary or unfounded reasons to fail his meter and vehicle inspections. He accused the taxi union of similar behaviour after his employment with Capital Taxi was terminated in 2013 for "personalizing fares", a practice that involves arranging for customers to contact a taxi driver directly—for example on their personal phone—and thus bypassing dispatch services. The

collective bargaining agreement prohibited this practice because of the untraceable nature of the rides undermined the equitable distribution of fares.

Mr. Mezher went to the Ontario Labour Relations Board to dispute his termination, maintaining that he was entitled to personalize fares and claiming that the union's actions were arbitrary, discriminatory, and constituted bad faith. The Board dismissed his application, finding that Mr. Mezher continued to personalize accounts despite repeated warnings and disciplinary measures prior to the termination of his employment. He claimed he was treated differently than other employees, but the board found no evidence that the union improperly targeted him. Rather, the Board concluded that the difference was that unlike other employees, Mr. Mezher refused to correct his behaviour. Mr. Mezher currently drives under the Blueline banner.

Mr. Mezher says that the arrival of Uber has affected his life. He claims that, since Uber's arrival, the volume of calls he received had dropped and as a result, he must work longer hours which has impacted the time he spends with his family. Mr. Mezher says he believed that investing in a taxi plate would provide him a marketable asset he could sell once he was ready to retire, and at the time of purchase, he did not anticipate any risk that the price of a plate in the secondary market would fall. However, he admits that he did not seek independent investment advice nor legal advice prior to the purchase.

Mr. Mezher's other investment accounts consist of a TFSA and RRSP which are managed entirely by his wife, who, as a CRA employee, possesses some level of financial expertise. Mr. Mezher testified that the mortgage for his home in Orleans is nearly paid off, he has since repaid back the money he borrowed from his brother-in-law to purchase his taxi plate, and he has financially supported all three of his children in obtaining their post-secondary educations.

Despite his heavy reliance on taxi plate values in the secondary market, Mr. Mezher admits that he knew little about the by-laws that governed his industry. He says he was unaware of the consultation and engagement opportunities prior to the enactment of the 2016 taxi by-law despite the posters, flyers,

and pamphlets circulated by the City during that time. As a result, he did not attend any of the sessions or provide written concerns to the City at any time prior to or following the 2016 taxi by-law.

ISKHAK MAIL

Nature of Witness: Plaintiff Witness, Fact (Representative Plaintiff)

Testimony Date(s): January 18-19, 2023

Mr. Mail is a representative plaintiff and former taxi plate license holder. He was born and grew up in Mazar e Sharif, Afghanistan. He attended university in the Soviet Union, where he eventually obtained his master's degree in civil engineering. He returned to Mazar e Sharif in 1985. After serving a mandatory term in the army, he worked as a construction engineer in Mazar e Sharif, eventually rising to the third or fourth highest position in the governmental hierarchy of his home province. Mr. Mail met his wife in university, and they were married in 1983. At the end of the 1980s, Mr. Mail and his family left Afghanistan due to political turmoil, ultimately arriving in Ottawa in 1991.

Upon his arrival in Canada, Mr. Mail worked various jobs. He was involved in a variety of businesses, including opening a restaurant in Hull with a partner, and co-owning a convenience store located in a gas station. While working at the gas station, Mr. Mail heard from taxi drivers and plate license holders that the taxi business provided flexible working hours and good income prospects.

Mr. Mail eventually sold his share in the gas station, and began working as a module tester for JDS Uniphase. In 2002, Mr. Mail was laid off as part of a mass termination at JDS Uniphase. He acknowledges that the mass termination was caused by JDS' business circumstances, and that his laying off had nothing to do with his personal skills or qualifications. After being laid off, Mr. Mail received financial assistance from Unemployment Canada to study civil engineering and technology at Algonquin College. He graduated in 2005, but had difficulty finding employment in his chosen field, due to an ongoing recession and general lack of hiring.

Mr. Mail did not wish to return to his gas station, convenience store, or restaurant businesses, due to the long hours required. Based on what he had had heard from taxi drivers and plate holders, he chose to start driving a taxi as it would, in his view, provide him with more flexible working hours, more time with his family, and better income prospects.

Mr. Mail began working as a full-time taxi driver in 2010, and leased a taxi plate operating under the Blue Line banner. It was his view that plates operating under this banner were more valuable than plates operating under Capital or Westway. In 2013, Mr. Mail acquired the rights to Ottawa taxi plate 525. Mr. Mail testified that he paid a total of approximately \$325,000 in consideration for this plate license, comprised of: a cheque for \$150,000; \$50,000 cash; and the assignment of his lease, valued at approximately \$125,000. Mr. Mail also paid a \$3,000 fee to Blue Line in relation to the lease transfer.

Mr. Mail was aware that the City's taxi by-law required him to truthfully disclose the amount he paid for his plate license. Despite this, he executed and filed with the City a sworn declaration stating that the Bill of Sale associated with his purchase of Ottawa Taxi Plate 525 "represents a bona fide transaction to the best of my knowledge and belief." The Bill of Sale listed a purchase price of \$150,000. Mr. Mail inaccurately reported the value of his acquisition at the urging of the seller. It was Mr. Mail's understanding that the seller was motivated to report a false value due to the tax implications.

At trial, Mr. Mail claimed that he reported a false transfer value because he was told by the City employee processing the transfer told him he could report any value he wanted. However, Mr. Mail did not make this claim during his cross-examination in July 2017, prior to the certification motion. During that cross-examination, Mr. Mail said that he reported the amount which was reflected on the bill of sale for the plate license transfer, despite the fact the recorded amount did not reflect the terms of the sale. When confronted about this inconsistency at trial, Mr. Mail's evidence was that the July 2017 transcript must be inaccurate.

During cross-examination, it was revealed that Mr. Mail does not keep a record of his cash fares and tips, and only estimates the amount of cash he receives on his tax returns. Mr. Mail listed his plate license as a depreciable asset on his 2013 T1, with a depreciation rate of 20%. He did so on the advice of his accountant, who acts for many others in the taxi industry.

Mr. Mail viewed the acquisition of a taxi plate license as an investment and also holds other investments, such as an RRSP and TFSA. He admits that he has not read the by-laws that governed his participation

in the industry. He acknowledges that the City regulates the taxi industry through by-laws but admits that he did not read the 2005 By-law that was in place when he leased a taxi plate, or the 2012 By-law which was in place when he obtained a taxi plate license. He also did not read the purchase agreement before buying the taxi plate.

Furthermore, he did not have his taxi plate appraised before selling it for \$12,000, stating that plate values are subject to market fluctuations and are not set by rule or regulation. Although he is a representative plaintiff in this action that revolves around the 2016 By-law, he has never read it.

Mr. Mail owns his home in Ottawa and no longer pays a mortgage. His wife continues to own and operate the beauty salon she opened shortly after they came to Canada. His two children are now 39 and 35 years old. His son works for the government and his daughter has a Master's degree in psychology and works for a private company. Mr. Mail stopped driving taxi after an accident in 2020 prevented him from working full-time shifts. He now delivers for UberEats on a part-time basis because he says it provides flexibility to control his schedule and work shorter shifts. Mr. Mail is aware of former taxi drivers who began working as PTC drivers because their fixed fees from driving taxis were too high.

DR. MICHAEL ORNSTEIN

Nature of Witness: Plaintiff Witness, Expert

Testimony Date(s): January 20 and 24, 2023

Dr. Michael Ornstein is an Associate Professor in the Department of Sociology at York University. Dr. Ornstein has a bachelor's degree in Physics from McGill University, and a doctorate from Johns Hopkins University in Social Relations. Dr. Ornstein is the Director of the Institute for Social Research at York University. Dr. Ornstein was qualified as an expert in sociology with a particular expertise in data analysis and structured inequality.

Dr. Ornstein filed an expert report that covered four discrete tasks:

1. Determine the representation of minority groups among taxi plate holders;
2. Consider the economic wellbeing of the particular minority groups prominent among plate holders;
3. Examine the representation of French Canadians among taxi plate holders;
4. Consider evidence of the historical disadvantage of French Canadians in general.

Dr. Ornstein compared the prevalence of certain minority groups among the plate holder group and the broader population. Dr. Ornstein did not compare the plate holders to the general population on any other metric. Dr. Ornstein did not consider any data on taxi brokers, taxi drivers, or PTC drivers. Dr. Ornstein did not review the 2016 Vehicle-for-Hire By-law and he did not consider it when preparing his report. Dr. Ornstein only considered historical data on the disadvantage of French Canadians; he did not consider whether French Canadians currently experience disadvantage.

Dr. Ornstein relied on three primary sources of data:

1. A list of the first and last names of the taxi plate license holders in Ottawa in the years 2014-2016;

2. The Public Use Microdata File from the 2016 Canadian Census;
3. The results of a survey conducted by the Leger Group of the taxi plate license holders.

To determine the ethnic origins of the plate holders, Dr. Ornstein used Google and other Internet search tools. Dr. Ornstein would enter each full name into Google and review the results for what they reflected about the geographic origin of the name. Dr. Ornstein based his visible minority classification entirely on this analysis. Dr. Ornstein was confident that this analysis was accurate. When assessing economic wellbeing, Dr. Ornstein relied exclusively on the income data reported in the 2016 Census. This data related to the Canadian population at large. Dr. Ornstein did not consider the economic wellbeing of plate holders or other taxi industry participants. Dr. Ornstein confirmed that he did not rely heavily on the data gathered through the Leger survey. Dr. Ornstein only reviewed the survey results in a general sense. Dr. Ornstein used the survey data primarily to confirm that his name-based analysis on the ethnic origins of the plate holders was accurate.

On cross-examination, Dr. Ornstein reviewed a series of occupational classification data from the 2016 Census and confirmed that members of the Arabic and South Asian visible minority groups work in a multitude of different occupations in the Ottawa-Gatineau census metropolitan area.

In his report, Dr. Ornstein did not consider any data on the racialization of PTC drivers. On cross-examination, Dr. Ornstein conducted his name analysis on a number of names of Uber drivers and confirmed that he would have classified the two he analyzed as falling within the “Arabic” visible minority group. It was also Dr. Ornstein’s opinion – based on his review of the academic literature on taxi drivers in Canada – that the places of origin of taxi drivers were strikingly similar to the places of origin of taxi plate license holders.

YESHITLA DADI

Nature of Witness: Plaintiff Witness, Fact

Testimony Date(s): January 23, 2023

Yeshlita Dadi is a taxi driver and plate holder and is a class member in this action. At trial, he provided testimony as a fact witness.

Mr. Dadi, now 63 years old, was born in Ethiopia to a middle class family. Following a revolution in the 1970s, political conflict and military violence disrupted the country, causing many to flee. Mr. Dadi fled Ethiopia in 1979 but was captured and held for three years in a Somalian prison. He spoke of the horrific conditions during his time as a prisoner and the difficulties he faced as a refugee once he was released. He later attended boarding school for two years through the United Nations High Commissioner for Refugees to train as an auto-mechanic, before returning to stay at a refugee camp in Djibouti. He was later granted refugee status by Canadian immigration officials.

Mr. Dadi arrived in Canada in 1990. He and his wife first stayed in Kingston, Ontario while he attended St. Lawrence College where he received a certificate in auto-mechanics. He then moved to Ottawa with his wife and first child where he says he faced difficulties finding a job. He was eventually hired by a Somalian man to work at an auto-garage; however, it was not possible to meet the necessary licensing requirements at that garage and he left to work at a convenience store. He later began working at a Shell gas station and did not return to the auto industry to complete the 5000 hours required to become a licenced mechanic.

Mr. Dadi entered the taxi industry in 1997 upon the advice of others in the Ethiopian community. He was 37 years old, had four children by that time and wanted more flexibility over his schedule. He completed the required courses at Algonquin College and shortly after, borrowed money to rent a taxi plate. He began driving under the Blueline banner and later moved to drive for Capital taxi.

Mr. Dadi purchased a taxi plate license in 2007 for \$210,000. He put down approximately \$10,000 in cash along with \$182,000 he received through refinancing his home. He borrowed the rest of the money

from Marc André Way, a loan which he has since repaid. Mr. Dadi sold his home in 2011 and paid off the loan in full. He then purchased the house he lives in today, which he paid off fully in 2020.

Prior to acquiring a taxi plate license, he did not consult financial or legal advice, nor did he do his own research prior to purchase. He says did not seek information as to what other plates were valued at and selling for and he did not question the purchase price of the plate sold to him. He says that he did not read or review the applicable by-laws prior to the purchase and he remains unfamiliar with them now. However, he admitted that he was well aware that plate values could fluctuate and that he purposely held on to his plate in the hopes that the value would rise when he was ready to retire. He says he did not consider a taxi plate to be a risky investment, and at the time of purchase it was less expensive to buy a plate than to continue leasing one.

Mr. Dadi has owned multiple residential properties and has demonstrated a reasonable level of financial knowledge. He placed a substantial down payment on the home he purchased in 2007, refinancing it after three months to pay for his taxi plate. He explained that when purchasing any of his residential properties he inquired about and considered the prices of other properties in the area and sought professional advice and assistance during each transaction.

When Uber arrived, Mr. Dadi says he protested against its operation in the Ottawa market. He claims that he quickly lost a considerable amount of business and he worried about looking after his family. He had six children, all of which were living at home. His youngest child was around 15 years old at that time. His children are now all university educated and his eldest son is a licenced pilot.

Mr. Dadi also spoke of the health issues he has faced including a cancer diagnosis and long-term retina damage he sustained in 2018 when he was violently assaulted by a passenger. He says that he has been depressed since Uber arrived because it caused him to have to work longer hours and make less money. On top of the 10-12 hour shifts he says he must now work, he says that the postponement of his retirement has caused him considerable stress.

CHRISTIAN BOURQUE

Nature of Witness: Plaintiff Witness, Fact

Testimony Date(s): January 25, 2023

Christian Bourque is an Executive Vice President and Senior Partner at Leger. Leger is a full service market research and public opinion firm. It is the largest of its kind in Canada. Leger offers services related to market research and public opinion through different quantitative and qualitative methodologies. These include surveys (telephone, online, etc.), focus groups, in-depth interviews, bulletin boards, *etc.*

The plaintiffs retained Leger to conduct a survey of individuals who were plate holders in the City of Ottawa between September 1, 2014 and September 30, 2016. Leger was instructed to contact only individual plate holders and not corporate plate holders. Leger identified 749 individuals who fit this description. Leger conducted a telephone survey in October & November, 2018. Only 180 plate holders responded to the survey.

The survey gathered data on the respondents that related to (1) their acquisition of a taxi plate, and (2) demographic data such as age, country of origin, religion, language. Mr. Bourque confirmed that the contents of the survey were dictated by the plaintiffs' counsel. Mr. Bourque also confirmed that the survey did not include questions about the respondents' income even though that is a typical survey question.

Mr. Bourque spoke about Leger's online research panel service called LEO. Mr. Bourque explained that LEO could be used to compile a custom survey panel based on a variety of demographic metrics and then survey that panel with a targeted questionnaire. Mr. Bourque explained that the LEO tool could be used to select visible minorities in Ontario and ask them if they had ever driven for a ride-sharing service, but this was not done.

In his testimony, the plaintiffs' expert on discrimination, Dr. Michael Ornstein, testified that he played a small role in designing the Leger survey. Dr. Ornstein also testified to his use of the survey data collected

by Leger in his analysis and expert opinion. In particular, he testified that he only relied upon the data collected by Leger in relation to the survey participants' place of birth. In this regard, Dr. Ornstein testified that he checked this data against his own name analysis methodology to ensure that he was properly categorizing plate holders into visible minority groups based on their names.

The plaintiffs, in their written submissions, do not rely on Mr. Bourque's testimony or the Leger survey at all.

ANTOINE EL-FEGHALY

Nature of Witness: Plaintiff Witness, Fact

Testimony Date(s): January 25, 2023

Antoine El-Feghaly is a taxi driver and plate holder and is a class member in this action. At trial, he provided testimony as a fact witness.

Born in Lebanon in 1963, Mr. El-Feghaly's father worked in construction while his mother was a stay at home parent to him and his six siblings. Despite doing well financially as a professionally trained accountant in Lebanon, Mr. El Feghaly fled the country to escape the significant violence caused by the civil war. He arrived in Canada in 1988 when he was 25 years old.

Upon arriving to Canada, Mr. El-Feghaly says that he wanted to obtain his accounting degree but the University of Ottawa would not recognize most of the education he completed in Lebanon. He also says that his refugee status required him to work. He began first working in construction with his brother-in-law, but became interested in the taxi industry after hearing about it from friends. He began doing pizza delivery as a means to familiarize himself with the city. When he joined the taxi industry around 1992, he was engaged and needed money for a wedding. As such, did not return to complete his degree.

Mr. El-Feghaly completed the necessary training at Algonquin College, rented a plate and began driving the day shift until he was able to enter into a lease agreement. He later purchased a taxi plate license in 2010. He says he paid \$320,000 for the taxi plate license despite the amount of \$150,000 officially recorded in the plate transfer documentation filed with the City. He alleges that the city employee overseeing the transfer advised him to report the purchase for \$150,000 figure, telling him that the amount recorded is of no importance. However, Mr. El-Feghaly admits that sale documentation along with a signed affidavit depicting the incorrect purchase amount was prepared prior to registering the transfer. To pay for the taxi plate license, he sold his existing lease for \$120,000, took out a line of credit for \$59,000, and refinanced his existing mortgage for \$150,000. When asked about the significantly high price he paid for the plate, he says that he believed the investment presented a low risk.

Following the purchase, Mr. El Feghaly continued to drive taxi during the day and rented out his plate to another driver during nights and weekends. He says that driving taxi provided him with a good life that allowed him to spend time with his family and provide for them. He was able to set up education investment accounts allowing each of his three children to graduate from university debt-free. His oldest daughter is a consultant with a Masters degree, his son holds degrees economics and finance and is the director of his own corporation, and his youngest is a civil engineer. Mr. El-Feghaly's children all still live at home. His wife does not work, and as a stay-at-home parent was able to volunteer at their children's schools and assist them throughout their education.

Mr. El Feghaly owns a construction company in addition to his continued work in the taxi industry. He claims that he owns no other property. His wife is the registered owner of the house that he and his family live in, which has a spacious pool. When asked about whether his wife owns any additional properties he stated that he does not know.

Mr. El-Feghaly says that since Uber arrived in Ottawa, he has had to work longer hours including weekends in order to provide his family with the same quality of life. He also expresses dissatisfaction over the current value of his taxi plate, as he had envisioned it to be a marketable asset upon retirement.

GREGORY MCEVOY

Nature of Witness: Plaintiff Witness, Expert

Testimony Date(s): January 26, 2023

Gregory McEvoy is a Chartered Professional Accountant in the City of Ottawa. He was retained by the plaintiffs to provide opinion evidence regarding aggregate damages. To that end, he prepared an expert report (dated September 3, 2019) that purports to quantify the plaintiffs' alleged loss.

Due to the deferral of Common Issue 5 to a second phase of the trial, Mr. McEvoy was called for the limited purpose of providing evidence in relation to notes taken from a series of meetings that he held with Mr. Way and his associates. The notes reveal that Mr. McEvoy met with Mr. Way and his associates on the following dates: September 25, 2018, November, 21, 2018, January 31, 2019, May 16, 2019, June 5, 2019, July 22, 2019 and August 28, 2019.

The notes (some of which were taken by Mr. McEvoy himself, others by his associate, Wendy Morgan) reflect the discussions that took place during these meetings. Mr. McEvoy relied on the notes in the preparation of his expert report regarding damages.

In his testimony, Mr. McEvoy confirmed a number of statements made by Mr. Way and his associates during these meetings, including with respect to the following:

- When Uber initially began operating in the City in the fall of 2014, there was not much of an impact on plate values;
- Plates did not start to lose value until September 2016, when the by-law came into effect;
- Taxi drivers are now trying to use Uber as an excuse to reduce monthly fees;
- Plates were still being sold as of the date of the meetings;
- There had historically been incentive (when the plate transfer fee was a percentage rather than a flat fee) to underreport transaction values;

- Some plate transactions are sold for nominal values for tax purposes or transferred to family members;
- The first year after PTCs came into the regulatory fold, there was a reduction in call count, although the reduction was not as significant as in 2015 and 2016;
- Metro Taxi has encouraged drivers not to rent out their cars or take on double shifts.

LESLIE DONNELLY

Nature of Witness: Defendant Witness, Fact

Testimony Date(s): January 26-27 and 30, 2023

Leslie Donnelly began working with the RMOC in 1994, and has been an employee of the City of Ottawa since amalgamation. Ms. Donnelly is currently the City's Corporate Public Policy Advisor, responsible for dealing with emerging issues. Between 2006 and 2016, she served as the Deputy City Clerk. Her role included managing policy, authoring governance and accountability reports for the City Clerk, and facilitating meetings of City Council from a procedural perspective. As part of her role, she would also attend meetings of standing committees where "procedural complexity" was anticipated. Ms. Donnelly was the lead author of the 2016 Staff Report in relation to the VFH Review. She had previously authored a major report related to the future of Lansdowne Park, as well as a major report on the impact of Covid-19 on Lansdowne.

Through her evidence, Ms. Donnelly provided a detailed overview of the City's process in conducting the VFH Review the ultimate enactment of the 2016 By-law. She explained how the VFH Review originated from a May 1, 2015 staff report, which recommended that the City retain a consultant to undertake a comprehensive review of its existing vehicle for hire regulation, including on the impacts of new technologies and service models. Council approved the review, which was based on the guiding principles of public safety, consumer protection, and accessibility.

Ms. Donnelly explained how the City then issued the RFP on July 9, 2015, and, through the RFP process, selected KPMG and its subcontractors to undertake the VFH Review. She provided the Court with a high-level overview of KPMG's methodology, which included: the publication of six discussion papers; extensive consultation with the public and key stakeholders, including representatives of the taxi industry and the accessibility community; the publication of the Policy Options paper; further consultations; and finally, KPMG's 2015 Final Report.

Ms. Donnelly outlined the City's efforts to publicize the VFH Review, which included advertising the review through its social media channels, and publishing all materials on a dedicated webpage in both official languages. She emphasized the breadth of public consultation that informed the VFH Review, as the City established a dedicated email address and telephone hotline to solicit public input. Ultimately, the VFH Review received more than 6,000 submissions from members of the public.

Mr. Donnelly discussed her role in writing the 2016 Staff Report and explained that her primary responsibility was to present the information in a way that was accessible and easy for the public to understand. In order to do so, she worked closely with operational staff to ensure that all recommendations were captured accurately. She also emphasized the importance of conducting thorough research to gain a comprehensive understanding of the policy context. In authoring the report, staff reviewed the research and recommendations prepared by KPMG, but also conducted their own research. Staff considered a white paper authored by the Competition Bureau on the topic of ridesharing regulation, and studied the approaches taken by other Canadian municipalities, including Toronto, Waterloo, Edmonton and Calgary. All of these cities ultimately established licensing regimes for ridesharing services broadly similar to the regime enacted in Ottawa.

She also discussed the City's recommendations contained in the 2016 Staff Report, and the manner in which those recommendations were shaped by the guiding principles of public safety, consumer protection, and accessibility.

Ms. Donnelly then discussed the consideration of the 2016 Staff Report by the Community and Protective Services Committee ("**CPSC**") in its Special Meeting held on April 7 and 8, 2016, and, ultimately by City Council on April 13, 2016. CPSC heard 48 presentations that expressed a range of views on the 2016 Staff Report, including from numerous members of the taxi industry such as Mr. Way, Richard Szirtes, the president of Westway, and the President and legal counsel of the taxi union.

During her testimony, Ms. Donnelly discussed the City's Equity and Inclusion Handbook and its Equity and Diversity Policy, highlighting the respective purpose and scope of each document, and the impact

these documents have on the City's actions. She noted that although the Policy was primarily focused on HR-related matters, it would apply in broad terms to the VFH Review. Ms. Donnelly noted that City staff are required to consider and apply the Equity and Inclusion lens in all aspects of their work, although they are not required to explicitly detail how they have considered/applied these documents in their work.

Ms. Donnelly also highlighted that the impact of the recommendations on all equity-seeking groups was discussed and considered by the City during the VFH Review. She emphasized the fact that the interest groups such as the taxi industry should not be viewed as monoliths, as equity concerns are best evaluated by letting individuals express their concerns in their own words, through consultation. She noted that elected officials are often put in the difficult position of balancing competing interests and objectives from diverse equity-seeking groups, and that the VFH Review was an example of this complexity. Ms. Donnelly also mentioned that the City does not currently collect disaggregated data about the taxi industry, which makes it difficult to engage in an independent analysis of impact, and therefore the City focused on establishing an equitable process through which feedback from all impacted stakeholders could be obtained.

Ms. Donnelly shared that during her preparation of the 2016 Staff Report, she was satisfied that the City's regulatory review and consultation process had satisfied the expectations of the Equity and Inclusion lens. She noted that the impact of the recommendations on equity-seeking groups was considered, and the City made efforts to gather input from those affected. She also reiterated the importance of the Equity and Inclusion Handbook and Policy in ensuring that the City's actions are equitable and inclusive.

BRIAN BOURNS

Nature of Witness: Defendant Witness, Fact

Testimony Date(s): January 31 and February 1-2, 2023

Brian Bourns was the Project Manager for KPMG's 2015 review of the City's vehicle-for-hire regulations.

Mr. Bourns was the lead author of KPMG's Final Report, as well as several other reports authored through the course of the review, including the Policy Options paper, and the Case Studies and Accessibility discussion papers.

Currently, Mr. Bourns is the principal of Maclaren Municipal Consulting, which he founded in 2016. It provides consulting services to municipalities across the country on a wide range of subjects, including by-law services and enforcement. Prior to founding Maclaren, Mr. Bourns was a Senior Manager with KPMG for 25 years, working almost exclusively with municipal clients. In his time with Maclaren and KPMG, He has conducted approximately 150 consulting projects with municipalities for more than 50 municipalities.

Mr. Bourns has extensive experience consulting for the City of Ottawa, and served as the lead consultant for the two major reviews of Ottawa's taxi regulation prior to 2015, which occurred in 2001 and 2004. Prior to his employment with KPMG, Mr. Bourns served as an elected municipal politician for 11 years, serving on various committees, as well as the councils of the Former City of Ottawa and the Regional Municipality of Ottawa Carleton.

Mr. Bourns provided detailed evidence regarding KPMG's role in the 2015 review, beginning with his role in preparing KPMG's Proposal to Serve, submitted in response to the City's July 9, 2015 RFP. He explained his rationale for including subcontractors (i.e. Mowat Centre, Core Strategies, and Hara Associates) in KPMG's project team, and highlighted the expertise that each of the subcontractors brought to the project.

Mr. Bourns provided detailed evidence regarding several aspects of KPMG's methodology for the review, and the manner in which it was shaped by the City's guiding principles of consumer protection,

accessibility, and public safety. He explained the overall structure and rationale for the process, including how the process was designed to ensure that stakeholders were engaged and that the recommendations developed by KPMG were grounded in the needs of the City and its residents. Mr. Bourns also discussed the development and purpose of the various discussion papers that formed the basis of consultation, as well as the later development of the Policy Options paper. He highlighted how KPMG sought and considered various stakeholder perspectives throughout the consultation process, with a particular emphasis on consultation with representatives of the taxi industry. This included meetings with Mr. Way, Coventry Connections, the taxi union, and Westway, and KPMG's consideration of two lengthy policy submissions from Coventry Connections. Mr. Bourns also spoke to the development and rationale behind KPMG's various recommendations to the City.

Mr. Bourns explained that KPMG considered the issue of plate values throughout its review, including in the Policy Options paper, and discussion papers authored by its subcontractor Hara Associates. This issue was not addressed in KPMG's Final Report, because it had already been addressed in these previous reports, and because the Final Report was intended to provide recommendations on a go-forward basis.

CHRISTINE HARTIG

Nature of Witness: Defendant Witness, Fact

Testimony Date(s): February 2-3 and 6, 2023

Christine Hartig is a Program Manager, Operational Support and Regulatory Services, with the BLRS branch of the City of Ottawa's Emergency and Protective Services Department. She has held that role since 2020. Ms. Hartig began her career at the City as a Strategic Enforcement Officer. From 2012 to 2020, she was a Strategic Initiative Project Officer, a role which was later retitled as an Issues Management Coordinator. From October 2015 to October 2016, Ms. Hartig was seconded to the officer of the General Manager of Emergency and Protective Services, and was the City's Project Manager for the VFH Review. In this role, she was responsible for overseeing the City's RFP process, and then for working with KPMG throughout the review.

Ms. Hartig elaborated on the responsibilities of BLRS, which includes administration and enforcement of numerous regulatory by-laws, including the City's Business Licensing By-law, Property Standards By-law, and Taxi/ Vehicle for Hire By-law. In her evidence, she outlined the manner in which BLRS is structured, including how its enforcement officers can be assigned to one of three groups: parking enforcement; property standards; and generalist. Ms. Hartig outlined the nature of BLRS's activities in relation to the 2012 By-law, which included administration of the licensing scheme, inspections of vehicles, enforcement of the by-law, and processing of plate transfers.

Ms. Hartig provided key evidence and insight into the City's taxi fee structure and the rationale behind the City's approach to setting fees. She laid out the costs incurred in administration and enforcement of the 2012 By-law, and the manner in which fees are charged to defray those costs. She explained that parsing out by-law cost between individual licensing categories would be difficult and laborious, since there is much overlap in terms of staff time and resources. Ms. Hartig provided an overview of the licensing fees charged under the 2012 By-law, highlighting how they compare reasonably to those of

other Ontario municipalities, and confirmed that the majority of BLRS' annual revenue comes from parking tickets.

She went on to highlight the number of service requests received by BLRS annually and explained that service requests related to the taxi industry represent only a small proportion of BLRS' overall enforcement activities. However, she also indicated that the administration and enforcement of the 2012 By-law was disproportionately resource-intensive, in comparison to other licensing categories.

Ms. Hartig detailed the City's early enforcement efforts against Uber, and her role in those efforts. This included her participation in the first undercover enforcement operation against an Uber driver, which occurred just days after Uber began operating in the City of Ottawa. Ms. Hartig spoke to the unprecedented challenges faced by BLRS in its enforcement efforts, which included Uber's use of dedicated software to identify and block the accounts of City employees. She discussed the City's deployment of new tactics to overcome these challenges, including using "burner phones," creating Uber accounts linked to new credit cards and the use of fake emails. Meeting these challenges required additional investigative effort and resulted in further cost.

Ms. Hartig discussed her involvement in the 2015 regulatory review, and in particular City Staff's process for assessing individual KPMG policy recommendations, and determining whether those recommendations should be accepted, rejected, or amended.

Ms. Hartig then discussed Staff's one year review of the 2016 By-law, which found that Uber continued to demonstrate a very high degree of compliance with the by-law. Through the one-year review, staff also continued to be of the view that cameras in PTCs were not necessary, as there were no significant safety concerns associated with Uber's operation.

Finally, Ms. Hartig highlighted the recent increase in the voluntary accessible levy charged to PTCs, from 7 cents per ride to 11 cents per ride. She then went on to report the various ways in which funds generated from the levy were being spent to improve accessible transportation services in Ottawa.

TANIA MCCUMBER

Nature of Witness: Defendant Witness, Fact

Testimony Date(s): February 7, 2023

Tania McCumber works as a Program Manager for Licensing, Administration and Enforcement for the City of Ottawa.

Ms. McCumber is educated in the area of municipal by-law enforcement and possesses three related diplomas. In 2000, she obtained a diploma in Police Foundations from Algonquin College, where she learned about policing, case preparation, investigations, communications, note taking, and interacting with diverse groups. Later, she completed the Advanced Investigations Program (a post-diploma program) at Algonquin, where she received further education on investigations, notetaking, and computer crime activity. In 2016, Ms. McCumber obtained a diploma through the Accredited Municipal Clerks of Ontario, where she learned about municipal management, including public administration, labour relations, and human resources.

Ms. McCumber's longstanding career in by-law enforcement and administration with the City of Ottawa began in 1999, when she began working as a casual Parking Enforcement employee for the City. In 2001, Ms. McCumber transitioned to the By-law and Regulatory Services department as a full-time by-law enforcement officer. In 2009, she was promoted to the position of Supervisor of By-law Enforcement. From 2013 to 2014, Ms. McCumber briefly worked as a Security Advisor with the City's Corporate Services Division, before returning to By-law and Regulatory Services to serve as the Coordinator for By-law Enforcement from 2014 to 2018. In 2018, Ms. McCumber transitioned to her current role as the Program Manager for Licensing, Administration and Enforcement.

In her role as Coordinator of By-law Enforcement, Ms. McCumber was involved with prosecutions under municipal by-laws and the *Provincial Offences Act*. Specifically, she ensured that the City's by-law enforcement officers had completed all required documentation, that all relevant information and

evidence had been collected in relation to by-law investigations, and that documentation had been adequately submitted to the courthouse.

During examination in chief, Ms. McCumber explained the difference between a Part I offence and a Part III offence under the *Provincial Offences Act*. Part I offences, otherwise known as a “Provincial Offence Notice” or “PON” has set fine amounts, with a 30-day period to issue the notice after the offence is committed. By contrast, Part III offences are typically more serious offences, and therefore do not have set fine amounts, and allow for service of the notice within six months of the offence being committed.

Ms. McCumber also gave evidence about the City’s “progressive enforcement” approach to by-law enforcement. Progressive enforcement, as she explained, is the City’s stepped approach to using education before enforcement. For example, in regards to an initial complaint, she described how progressive enforcement may proceed, beginning first with an initial verbal warning, followed by the issuance of a PON, and then a summons to court.

Ms. McCumber also explained that, since she started working in by-law enforcement, the City has been collecting and maintaining data regarding the City’s taxi industry. This data includes information pertaining directly to taxi plate holders and taxicab drivers. In particular, the City collects information regarding these individuals’ name, phone number, email address, home address, the number of years they have been licensed, and the renewal terms pertaining to their license(s). The City also collects data regarding individuals who drive for private transportation companies (PTC). This includes information regarding those individuals’ names, addresses, driver’s abstracts, and criminal records checks. Additionally, PTCs, such as Uber and Lyft, regularly provide the City with lists of drivers associated with their companies in compliance with the City’s taxi by-law.

In her previous by-law enforcement capacities, Ms. McCumber confirmed that she was involved in the City of Ottawa’s regulation and enforcement of taxicabs and PTCs. With respect to Uber specifically, from December 2014 onwards (*i.e.* upon her return to By-law and Regulatory Services from the City’s

Corporate Services Division), Ms. McCumber played a key leadership role in the development and implementation of the City of Ottawa's enforcement strategy against unlicensed Uber drivers. During this time, Ms. McCumber also oversaw all enforcement actions for the City's taxicab by-law.

In speaking about the enforcement effort against Uber, Ms. McCumber testified that she understood the concerns that the arrival of Uber in the City would present for its By-law and Regulatory Services Branch. Specifically, she testified that concerns stemmed from the fact that the licensing by-law was specific to regulating taxis, raising uncertainties around insurance and consumer protection in relation to PTC services like Uber.

The City's investigative effort against unlicensed Uber drivers, nicknamed "Operation Blackbird", began upon Uber's arrival in the City in October 2014. In response to Uber's arrival, Ms. McCumber explained that the City's "Procedure for Unlicensed Taxi Cab Enforcement" was the City's initial strategy for carrying out enforcement against unlicensed Uber drivers. The strategy, which was authored by Ms. McCumber's predecessor, Philip Powell, was in effect from October 2014 to January 2015, and was focused on ensuring officer safety as well as enforcement against Uber drivers. The elements of the strategy consisted of booking a ride, gathering evidence, filing information, and determining if violations had occurred. Practically, two officers were required to carry out the strategy, a uniformed officer and a plain-clothes officer. The plain-clothes officer would enter the Uber vehicle, while the uniformed officer tailed the Uber vehicle with an unmarked car. At the end of the ride, the plain-clothes officer would return to the unmarked vehicle.

A second enforcement strategy, authored by Ms. McCumber, came into effect in January 2015 and portions remained in place until October 2016, when Uber became licenced to operate in the City. This second strategy evolved from the first strategy in that the City began serving charges against unlicensed Uber drivers in batches after identifying a sizeable number of drivers, rather than issuing individual charges on the spot. This shift in strategy emerged in response to Uber's practice of banning/blocking by-law officers' Uber accounts after charges had been successfully laid under the first strategy.

However, similar to the first strategy, this strategy involved having by-law officers book rides, collect evidence, and take Uber rides from point A to point B.

Ms. McCumber explained that, as part of this investigation, she tracked the charges laid on unlicensed Uber drivers. This included collecting, maintaining and updating data about the investigating officer in each investigation, the Uber driver name and identification details, whether charges were successfully laid, and the status of investigation/prosecution. From this data, Ms. McCumber testified that, in the 2014 to 2016 period, the City issued a total of 230 Part I offences and 43 Part III Summons against 189 people in relation to operation of an unlicensed taxicab.

During her testimony, Ms. McCumber noted that the City faced challenges enforcing against unlicensed Uber drivers. These challenges included developing an understanding about Uber's platform and how the application worked, as well as difficulties around Uber's practice of banning officer accounts. Ms. McCumber explained that, since officer accounts were being blocked by Uber, the City was required to continually purchase new SIM cards and cell phones to carry out enforcement. The City also created Uber accounts under alias names and credit cards to continue enforcement efforts. Despite these challenges, the City's by-law enforcement branch was never advised to discontinue or slow down enforcement against unlicensed Uber or PTC drivers.

Ms. McCumber also gave evidence regarding various costs incurred by the City in relation to the administration and enforcement of the City's taxi by-law. These include the following: compensation costs associated with employing at least three to four by-law enforcement officers for taxi enforcement, compensation costs associated with employing eight license administration staff, as well as by-law vehicle and equipment costs. In providing this evidence, Ms. McCumber also spoke about the additional costs incurred by the City's investigation into unlicensed Uber drivers. To that end, Ms. McCumber estimated that a single investigation of an unlicensed PTC driver incurred costs to the City of around \$18,000 to \$20,000 (on average).

On cross-examination, when asked about whether Uber operated as a dispatcher of taxicab services, Ms. McCumber explained that Uber did not meet the by-law definition for “dispatching” under the by-law. She explained that although the issue was discussed amongst by-law staff, it was concluded that the Uber platform did not meet the statutory definition. This is because, based on the information gathered by the City, the application simply served as a platform on which individuals could advertise that they were looking for a ride, but it was ultimately up to individual drivers whether to in fact agree to take on the ride. As such, the platform did not “call” or “dispatch” drivers on behalf of riders in the way that was contemplated under the by-law.

SUSAN JONES

Nature of Witness: Defendant Witness, Fact

Testimony Date(s): February 8-10, 2023

Susan Jones is a former veteran municipal employee. She began her career working with the City of Nepean in 1983 as a Parking Control Officer before moving into other areas of responsibility as a frontline By-law Enforcement Officer. As a By-law Enforcement Officer, Ms. Jones was responsible for enforcing by-laws relating to animal control, noise complaints, debris, and property standards issues. In 1989, Ms. Jones was appointed to the role of Chief License Inspector for the City of Nepean. In that role, she was responsible for frontline enforcement of all of the municipality's by-laws (including taxi enforcement).

In 1991, Ms. Jones became the Head of By-law for the City of Nepean, and was therefore responsible for administration and enforcement of all by-laws as well as all of the officers that worked within the By-law Division. Ms. Jones remained in that position until the amalgamation of the City of Ottawa.

In the fall of 2000, Ms. Jones assumed the role of Director of By-Law Licensing for the Current City. In that role, Ms. Jones had oversight over by-laws associated with animal control and noise, as well as the City's smoke-free regulations. She was also responsible for administration and enforcement of all the City's by-laws associated with licensing. This included by-laws relating to taxis, limousines, and refreshment vehicles. In fact, as a result of amalgamation, Ms. Jones explained that approximately 500 by-laws remained in force from the Predecessor Cities, all of which fell under her purview. These by-laws remained in force until each were amended or appealed following amalgamation. Ms. Jones was also involved in the policy work associated with reviewing each of these by-laws after amalgamation.

Around this same time, Ms. Jones was appointed to chair a committee that would report to the Ottawa Transition Board (the entity which was mandated by the Province of Ontario to carry out the amalgamation of the City of Ottawa). The committee was tasked with addressing by-law reform in the

Current City. Ms. Jones also had ultimate oversight over the harmonization of taxi and limousine matters as a result of her role as Director of By-law Licensing.

In 2004, Ms. Jones moved briefly into the role of Acting General Manager for the City, where she had direct responsibility, oversight and management over activities such as fire, paramedics, emergency management, by-law and licensing (including taxi and limousine licensing). In 2008, Ms. Jones assumed the role of General Manager. She remained in that role until 2015, when she assumed the role of Acting Deputy City Manager.

As Acting Deputy City Manager, Ms. Jones had higher levels of responsibility, including oversight over managing activities, work and policy matters associated with seven other departments within the City (including Public Works, Social Services, Information Technology, Parks and Recreation, Human Resources, *etc.*). Ms. Jones is now retired from the City.

Through her evidence, Ms. Jones provided a detailed explanation of the background and framework for taxi regulation in the Predecessor Cities and the amalgamated City of Ottawa. In so doing, Ms. Jones highlighted the public policy rationale behind the establishment of plate limits in the City (which Ms. Jones explained were established to promote public safety and consumer protection).

Ms. Jones also explained the historical underpinnings of the various fees set out in the City's taxi by-laws, most of which date back to the pre-amalgamation period. In her testimony, Ms. Jones explained that, during the process of harmonizing taxi fees following amalgamation, City staff considered (at a high level) the costs associated with carrying out the administration and enforcement of the City's existing taxi regulations, and proposed harmonized taxi fees to recover the City's costs.

Ms. Jones discussed the evolution of the City's framework for taxi regulation (including taxi fees) following the harmonization of taxi fees. In particular, Ms. Jones explained the events leading up to the enactment of the 2005 By-law, the 2012 By-law, as well as her involvement in the VFH Review and enactment of the 2016 By-law. As part of these discussions, Ms. Jones highlighted the comprehensive consultative efforts undertaken by the City, and the input received from taxi industry stakeholders.

While discussing her involvement in the VFH Review process specifically, Ms. Jones' testimony provided key insight into the reasons why City staff amended or rejected certain recommendations put forth by KPMG.

Given her extensive experience in by-law enforcement with the City, Ms. Jones also testified to the City's prior experiences enforcing against unlicensed taxicab operations (such as Quest Services), and the labour intensive nature of those investigations. In so doing, she highlighted the historical difficulties faced by the City vis-à-vis unlicensed taxicab operations and the City's efforts to address those difficulties (such as by initiating a public marketing campaign, and lobbying the Province of Ontario for greater enforcement powers under the *Highway Traffic Act*).

In speaking about Uber specifically, Ms. Jones shared that the platform presented new and unique difficulties for the City's by-law enforcement team. Nevertheless, she noted that by drawing on best practices from historical enforcement efforts against unlicensed taxicab operations, the City continued to enforce against Uber throughout the 2014 to 2016 period. This included laying charges against unlicensed Uber drivers and assessing whether injunctive relief could be pursued against Uber as an unlicensed broker. To that end, Ms. Jones explained that, upon Uber's arrival in the City in the fall of 2014, her personal view was that Uber was operating as an unlicensed broker in contravention of the City's taxi by-law. However, she noted that this personal view changed over time. Her view was later informed by the Court's decision in *City of Toronto v. Uber Canada Inc. et. al.*, 2015 ONSC 3572, which also informed the City's policy position on this issue. Ms. Jones also noted that the City's policy position was informed by discussions and consultations with the City's counterparts in the City of Toronto, which had been carrying out enforcement against Uber since 2012.

Ms. Jones also explained the scope of the City's prosecution powers. In particular, she explained that the City has enjoyed prosecutorial independence from the Province of Ontario since amalgamation, as confirmed by a Memorandum of Understanding executed between the Province of Ontario and the City. She also noted that the City has delegated authority vis-à-vis litigation matters to the City Clerk and Solicitor, as confirmed by the City's Delegation of Authority by-laws.

CHRISTOPHER POWERS

Nature of Witness: Defendant Witness, Fact

Testimony Date(s): February 13, 2023

Mr. Christopher Powers is a Constable with Ottawa Police Services, and was previously a By-law Enforcement Officer and Supervisor in the City's By-law and Regulatory Services department.

Mr. Powers is educated in several areas of law enforcement. In 2004, he received a diploma from Algonquin College in the Police Foundations program, where he learned about provincial statutes, evidence gathering, notetaking, investigations, and computer programming. In 2016, Mr. Powers received a Bachelor of Arts in Criminology from Carleton University. Mr. Powers has also completed Basic Constable Training at the Ontario Police College, where he was trained in provincial statutes, the Criminal Code, use of force, notetaking, evidence gathering, and Indigenous studies.

Mr. Powers began his career in law enforcement at the City of Ottawa in May 2007, as a Summer Student for the By-law and Regulatory Services department. In 2007, he became a By-law Enforcement Officer with the City, where he focused on enforcing the City's traffic and parking by-laws, participated in proactive and reactive complaint investigations, and conducted parking enforcement. In 2010, Mr. Powers became a generalist By-law Enforcement Officer, where he enforced a broader range of by-laws, including noise, parking, parks, use and care of roads. In that role, Mr. Powers took notes, gathered evidence, issued Part I charges, Part III charges, and appeared before the Court to testify on a number of matters. In 2014, he was promoted to the role of Supervisor in the By-law and Regulatory Services department, where he oversaw a platoon of eight to twelve generalist By-law Enforcement Officers. He spent two years in this supervisory role, before he joined Ottawa Police Services in his current role.

Mr. Powers was involved with the development and implementation of the City's initial Uber enforcement strategy in the fall of 2014. Mr. Powers believed that he was brought on to assist with developing the initial strategy because of his previous enforcement experience on special assignments, dedicated

enforcement projects, and taxi recertification inspections. He also believed that he was recruited because he had shown himself to be an eager employee. As part of Mr. Powers' involvement in developing the strategy, he participated in the first sting operation against unlicensed Uber drivers.

From 2014 until Mr. Powers' departure from By-law and Regulatory Services in 2016, Mr. Powers conducted ride investigation as required under the City's enforcement strategy. Mr. Powers explained the procedure for an Uber ride investigation, which consisted of a non-uniformed officer hailing an Uber ride, while a uniformed officer followed or "tailed" the Uber vehicle. Evidence collection was required for these investigations, which included taking notes of the ride, as well as capturing screenshots of the Uber app throughout the duration of the investigation.

In his examination in chief, Mr. Powers walked through all of the different evidence he was required to collect during an Uber ride investigation and to issue charges against the offending driver. For example, in order to investigate and lay charges on an unlicensed Uber driver, Mr. Powers collected the following types of documents: a Bylaw Services Occurrence Report, a typed report of his officer notes, a copy of his handwritten notes, receipts, screenshots of the Uber application depicting the ride details, witness statements from the riders/investigation officers, the charging document (e.g. a Provincial Offence Notice or Part III Summons), internal email correspondence, and a court summons document. In so doing, although Mr. Powers was not involved in the prosecution process for each investigation, he explained that it was part of his duties to compile the evidence that he gathered into a court brief package or Crown brief for prosecution and disclosure purposes. Furthermore, Mr. Powers was required to attend Court to testify and to provide evidence in support of these prosecution efforts.

Mr. Powers stated that by-law officers faced barriers and challenges while enforcing against unlicensed Uber drivers. For example, Mr. Powers explained that there were challenges associated with balancing Uber enforcement efforts with his responsibilities as a generalist By-law Enforcement Officer. He also noted that there were difficulties associated with the fact that Uber persistently deactivated officers' accounts.

As a result, the City's Uber enforcement strategy evolved over time to address these challenges. A locked account required a new device, credit card, email address, and Uber account, to continue with enforcement. Mr. Powers also explained that officers adopted different approaches for carrying out investigations and laying charges. For example, officers began switching between multiple devices when taking multiple rides in a day to avoid displaying unusual ride behaviours that may alert Uber to their investigative efforts. In other words, officers attempted to mimic the ride habits of an average Uber user to avoid detection by Uber and prevent accounts from being blocked.

Officers also transitioned to a strategy where they alternated between periods of taking rides (and hence gathering evidence) and periods of laying charges. The City adopted this strategy to minimize the risk of officers being locked out of the application. However, this new strategy introduced additional challenges for officers, associated with attempting to locate drivers to personally serve them with charges several days after the rides were completed.

In general, in order to conduct a typical Uber investigation, Mr. Powers noted that he required a cell phone, credit card, email address and Uber account. He also required the assistance of a second officer and an unmarked vehicle. Although the officers did not require a new phone and credit card for every single new investigation, officers were frequently blocked from the application. Officers attempted to increase efficiency by using two devices for enforcement at once.

Mr. Powers also explained the differences between a Part I and Part III offence under the Provincial Offences Act. Mr. Powers noted that the penalty under a Part III offence is under the discretion of the Court and the Justice of the Peace, with a maximum penalty of \$5,000. For Part I offences, he also explained that an offence notice must be issued within thirty days of the offence, whereas Part III offences could be issued after thirty days (subject to the issuance of a subpoena). As such, due to the evolution of the City's enforcement strategy and the challenges associated with locating and serving drivers, Mr. Powers explained that proceeding with a Part III summons was sometimes the only option available for officers seeking to enforce against unlicensed Uber drivers.

MORGAN TAM

Nature of Witness: Defendant Witness, Fact

Testimony Date(s): February 13, 2023

Morgan Tam is currently the Program Manager of Applications Management within the City's Information Technology (IT) department.

Mr. Tam has held several positions with the City of Ottawa. He started in 2007 as a Customer Service Representative in Parks and Recreation, and then moved into IT, where he managed mobile device management systems and City-issued devices and tablets. Mr. Tam also previously worked with the City's public health applications and worked on upgrading operating systems on City devices.

From 2013 to 2018, Mr. Tam was the Coordinator of Dispatch, Logistics and Training for the By-law and Regulatory Services department. In this role, Mr. Tam managed the department's dispatch team, checked data for accuracy, sent officers on the road, monitored radio systems, and issued information letters and warnings from dispatch. Mr. Tam also supervised officers' supply of work equipment such as vehicles, mobile devices, laptops, software, personal protective equipment (PPE), and batons. Finally, Mr. Tam coordinated mandated training for by-law officers. At the time, Mr. Tam reported to the Chief of By-law or to the Program Manager of Operational Support.

Mr. Tam was involved in the City's enforcement efforts against unlicensed Uber drivers from 2014 to 2016. Mr. Tam confirmed that in order to investigate and potentially charge Uber drivers for operating unlicensed "bandit" taxis, the City adopted a strategy to allow the officers to take rides and gather evidence.

Mr. Tam provided the logistics, specifically pertaining to mobile devices used by the officers to take rides and use the Uber applications. In his role, Mr. Tam was responsible for equipping by-law officers with cellphones, Uber profiles, credit cards, SIM cards, and other relevant equipment to carry out enforcement.

While enforcing against unlicensed Uber drivers, Mr. Tam testified that he and the officers faced several challenges with the Uber technology. In particular, Mr. Tam explained that the Uber accounts he created for by-law officers were often blocked after charges were laid. As such, Mr. Tam was constantly troubleshooting issues and brainstorming solutions to avoid these challenges. Mr. Tam suspected that Uber was blocking accounts based off information such as the officers' credit card numbers, names, and/or email addresses.

In order to bypass Uber's account blocking practices, Mr. Tam implemented solutions such as using alias names, employing different credit card numbers, email addresses, and burner devices. In particular, Mr. Tam worked with the City's Finance department to use alias names on corporate credit cards to minimize the risk of Uber recognizing the City's credit accounts. Similarly, when Mr. Tam suspected that Uber was tracking user locations for account blocking purposes, he put in place protocols that directed by-law officers to turn on their devices once they were safely away from City offices.

Using these efforts, Mr. Tam attempted to have enough devices ready and working anytime an officer was scheduled to take an Uber ride. Furthermore, any time a device would stop working, Mr. Tam would seek to have other devices ready for enforcement. Despite these challenges, as a result of their adaptive efforts, Mr. Tam testified that the City was consistently able to resolve issues and continued to take rides and lay charges.

Mr. Tam estimated that it took him approximately three hours to set up a new device for enforcement against unlicensed Uber drivers. Overall, Mr. Tam estimated that the City acquired approximately 30-40 cell phones to assist with its investigations in the 2014 to 2016 period. In addition, Mr. Tam also organized vehicles used in enforcement operations. If Mr. Tam required unmarked vehicles, then he would coordinate with the City's Fleet Services department, which would sometimes take up to two months.

Mr. Tam stated that, from a procurement perspective, the City's enforcement effort against Uber was more challenging and required more effort than any other enforcement effort that Mr. Tam had ever

been involved in. This included any enforcement operations that require unmarked vehicles. For example, Mr. Tam had never been required to set up technology equipment for any prior enforcement operation. Furthermore, the costs associated with enforcement against unlicensed Uber drivers were over and above any standard costs for any of the City's prior enforcement efforts.

Mr. Tam's involvement with the City Uber enforcement was in addition to his standard day-to-day tasks as the Coordinator of Dispatch, Logistics, and Training. Although the Uber enforcement effort added additional work to his plate, Mr. Tam nevertheless worked diligently to address the challenges that the Uber investigation presented.

CYRIL ROGERS

Nature of Witness: Defendant Witness, Fact

Testimony Date(s): February 14, 2023

Cyril Rogers is the General Manager of Corporate services, and Acting Chief Financial Officer (“**CFO**”) of the City of Ottawa. He was appointed to the role of Acting CFO in December 2022. In this role, he provides oversight of the budgeting process, strategic financial planning, financial reporting, and revenue collection. Prior to serving as Acting CFO, Mr. Rogers served for approximately one year as the Deputy Treasurer of Financial Strategies, Planning and Client Services. In this role, he was responsible for financial strategic planning and budgeting for the City, and providing financial services support to the City’s various branches. Before that, he served as the CFO for the Ottawa Police Service, and had previously occupied the position of Manager of Financial Services and Budgeting at the City. Mr. Rogers has been employed by the City of Ottawa since 2013, and has worked in the Finance Department that entire time. He is a Certified Management Accountant and Certified Professional Accountant, and holds a Bachelor’s Degree in Business Administration and a Master’s Certificate in municipal leadership.

Mr. Rogers gave evidence with respect to the City’s methodology for setting and updating licensing fees. He confirmed that the fees charged under the City’s taxi by-law are set in accordance with a cost-recovery model, and are intended to recover both the direct and indirect costs of administering and enforcing the by-law. Direct costs include those related to City employees directly involved in administration and enforcement of the by-law. Indirect costs are those required to support service delivery, which includes costs related to HR, legal and financial support, costs of equipment, and costs related to management employees.

Mr. Rogers explained that the City does not calculate the costs of administration and enforcement of individual by-law licensing categories, as it would be counterproductive to do so. Indirect costs are highly variable from year to year, and parsing the costs between individual licensing categories would be both

highly burdensome from an administrative perspective, and premised on significant assumptions. It was Mr. Rogers' evidence that such an exercise would necessitate an increase in licensing fees, as the high costs of the granular analysis required to parse out the costs of individual categories would add to the costs that must be recovered through the licensing fee. Overall, the burden of such an exercise would be disproportionate to any minimal benefit that might result.

Mr. Rogers confirmed that between 2012 and 2016, the funds received from fees charged under the 2012 By-law constituted approximately 5-6% of the total revenue of BLRS. The vast majority of BLRS' revenue comes from parking tickets. Mr. Rogers also confirmed that all licensing fees are reviewed annually through the budgeting process, and that they will be subject to deeper analysis if there is a consistent incongruity between the anticipated costs of a licensing regime and the amount recovered through licensing fees. No such incongruity has occurred in relation to taxi licensing fees.

Mr. Rogers confirmed that between 2011 and 2021, BLRS operated at a deficit against projected revenue more often than not, and that revenue from parking tickets was the main factor in determining whether a deficit or surplus would occur. BLRS deficits are funded from the City's stabilization fund, and any surplus is used to cover shortfalls in other City accounts. Between 2012 and 2016, the funds received from fees charged under the 2012 By-law constituted approximately 0.05% of the City's overall budget.

In cross-examination, Mr. Rogers was confronted with three examples of municipalities that had conducted specific costing analyses of their user fees: the City of Toronto conducted a review of its development application fees; the Municipality of New Tecumseh reviewed its planning and building fees; and the City of Milton reviewed all of its user fees. Mr. Rogers explained that the costs involved in planning, building and development fees are more rigid, less variable, and more predictable than the costs involved in licensing and enforcement of a taxi by-law. On that basis, the New Tecumseh and Toronto reviews are not comparable to the work that would be required to conduct a specific costing of taxi licensing fees in the City of Ottawa.

Further, he explained that a review of user fees in Milton, with a population of approximately 110,000 people and a proportionately smaller municipal government, would be far less administratively burdensome than a similar review in Ottawa. These reviews did not change Mr. Rogers' view that the burdens of such a review in Ottawa would not be proportionate to any possible benefit.

DR. GRACE-EDWARD GALABUZI

Nature of Witness: Defendant Witness, Expert

Testimony Date(s): February 15 and 16, 2023

Dr. Grace-Edward Galabuzi is an Associate Professor in the department of Politics and Public Administration at Toronto Metropolitan University (formerly Ryerson University). Dr. Galabuzi has held that position since 2003. Dr. Galabuzi has a Bachelor's degree in Economics from the University of Winnipeg, as well as a Bachelor's degree, Master's degree, and Ph.D. in Political Science from York University. Dr. Galabuzi is also a Senior Research Fellow at the Makerere Institute for Social Research at Makerere University in Kampala, Uganda.

Dr. Galabuzi's academic work focuses on race and ethnicity, the racialization of the Canadian labour market; and social exclusion and the social economic status of racialized groups in Canada. Dr. Galabuzi has published a number of papers on the topic of racial inequality in the labour market, including:

- *Measuring Racial Discrimination in Canada: A Call for Context and More Inclusive Approaches*, by Grace-Edward Galabuzi (Canadian Journal of Social Research, Vol 3, Number 2 2010)
- *Canada's Colour Coded Labour Markets: The Gap for Racialized Workers* by Sheila Block & Grace-Edward Galabuzi (Canadian Centre for Policy Alternatives, 2011)
- *An Immigrant all Over again? Recession, Plant Closures and Older Racialized Immigrant Workers : A case Study of the Workers of the Progressive Moulded Products* by Winnie Ng, Aparna Sundar, Grace-Edward Galabuzi, Sedef Arat-Koc, Salman Khan & Sareh Serajelahi (Centre for Labour Management Relations, June 2013)
- *Comparing the Colour Code: An Analysis of the Racialized Labour Market in Ontario Using National Household Survey Data* by Sheila Block, Grace-Edward Galabuzi & Alexandra Weiss (Wellesley Institute, 2014)

- *Persistent Inequality: Ontario's Colour Coded Labour Market* by Sheila Block & Grace-Edward Galabuzi (Canadian Centre for Policy Alternatives, 2018)

In this proceeding, Dr. Galabuzi was qualified as an expert in “racialized and immigrant populations in the Canadian labour market”. Dr. Galabuzi prepared a report commenting on the expert report of Dr. Ornstein. Dr. Galabuzi was asked to provide his opinions, comments, and responses regarding the methodology, approach, data set, assumptions, and conclusions with respect to each issue addressed in Dr. Ornstein’s report.

Dr. Galabuzi agreed with Dr. Ornstein’s general finding that certain racialized groups experience disadvantage in Canadian society. Dr. Galabuzi also agreed that many of the taxi plate license holders were racialized and immigrants. However, Dr. Galabuzi determined that the data analyzed by Dr. Ornstein did nothing to show whether the racialized and immigrant plate holders were affected by the City’s regulatory change. Dr. Galabuzi explained that in order to assess the impact of the regulatory action at issue, there must be data that allows one to compare the affected cohort against a controlling cohort. In Dr. Galabuzi’s opinion, the data analyzed by Dr. Ornstein did not allow for this kind of comparison. Dr. Galabuzi confirmed that Dr. Ornstein’s data did not include information about the incomes of taxi plate holders, taxi drivers, or PTC drivers. Dr. Galabuzi also confirmed that Dr. Ornstein’s report did not say anything about any economic disadvantage experienced by the plate holders.

Dr. Galabuzi also commented on the survey data that was prepared by the Leger Group and relied on in Dr. Ornstein’s report. Dr. Galabuzi’s opinion was that the survey data was insufficient to isolate the effect of the City’s regulatory change on taxi industry participants. In particular, Dr. Galabuzi observed that the survey did not include any data on the incomes of taxi industry participants, either before or after the regulatory change.

Finally, Dr. Galabuzi criticized Dr. Ornstein’s methodology for failing to consider PTC drivers. In Dr. Galabuzi’s opinion, data about the racialization and the economic wellbeing of participants in PTC services like Uber would have been necessary to establish any differential effect relating to the regulatory change.