Court File No.: 16-69601

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

METRO TAXI LTD., MARC ANDRÉ WAY AND ISKHAK MAIL

Plaintiffs

- and -

CITY OF OTTAWA

Defendant

Proceeding under the *Class Proceedings Act*, 1992

CLOSING SUBMISSIONS OF THE DEFENDANT, CITY OF OTTAWA

COMMON ISSUE 5

March 28, 2025

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EXECUTIVE SUMMARY

1. Following the enactment of the Vehicle for Hire By-law (the "**2016 By-law**") and in response to the City of Ottawa's (the "**City's**") actions after the arrival of Uber, the Plaintiffs (*i.e.* taxi plate holders and taxi plate brokers in Ottawa) initiated class proceedings against the City. In those proceedings, the Plaintiffs sought damages for (among other issues) the City's failure to enforce its 2012 Taxi By-law in the period September 1, 2014 to September 30, 2016 (the "**Loss Period**").

2. On May 13, 2024, the Court found the City negligent in enforcing the 2012 Taxi By-law during the Loss Period. As a result, the Court is now tasked with determining the following question: are damages assessed in the aggregate an appropriate remedy?

3. In response to this question, the Plaintiffs have informed the Court that they do not intend to pursue aggregate damages for the Taxi Broker Class. However, in respect of the plate holder class, the Plaintiffs continue to insist that damages should be awarded in the aggregate by calculating loss in taxi plate value as a class, rather than individually.

4. The Plaintiffs advance this argument without articulating any supporting methodology by expert opinion or otherwise. Instead, the Plaintiffs simply state that a methodology is possible and evidence to that effect will be presented at a later stage of the proceedings. In other words, the Plaintiffs have not advanced their position on the issue of aggregate damages beyond what they presented at the certification stage of these proceedings. In this respect alone, they have failed to satisfy their burden to demonstrate that aggregate damages are appropriate.

5. However, even if the Plaintiffs had set out a methodology to compensate plate holders for loss in plate value, the evidence shows that such an approach would be inherently flawed and unreasonable. First, the evidence of plate value transfers tendered at trial (which the Plaintiffs propose to rely on to calculate loss of plate value) is demonstrably unreliable, both from a qualitative and quantitative standpoint:

(a) Qualitatively, the evidence of plate value transfers tendered at trial does not reflect the true consideration agreed upon or paid between transferor and transferee. Rather, the evidence points to widespread false or incomplete reporting of plate transfer values amongst the plaintiff class.

(b) Quantitatively, the number of plate value transfers tendered at trial is simply insufficient to demonstrate any actual reduction in the value of standard plates during the Loss Period. The number of standard plate transfers during the Loss Period represents 0.5% of the total number of standard plates.

(c) The evidence is also unreliable as it fails to account for differences between plate values and business models. This is concerning as plate holders have historically received different compensation for the same asset, ranging from as low as $1 to as high as $320,000.

6. Second, the Plaintiffs' proposed approach would overstate the City's liability by failing to consider or account for existing market constraints/realities. For example, the Plaintiffs' approach incorrectly assumes that all plate licenses could have been liquidated simultaneously, without any resulting impact on plate value. Further, the Plaintiffs ignore the evidence that shows no actual loss in standard plate value appears to have occurred during the Loss Period.

7. Therefore, to the extent the Plaintiffs have suffered a loss within the Loss Period, an individualized approach based on plate holders' loss of income from the taxi plate is more appropriate and reliable. Contrary to the Plaintiffs' position, an individualized approach does not impede access to justice. Rather, it allows the Court to leverage its statutory powers under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("**CPA**") to craft a process for individualized damages assessments that is efficient and cost-effective. In so doing, the Court can employ creative and proportional methods to simplify and

expedite the assessment of individualized damages, while ensuring that fairness and access to justice are preserved.

SUMMARY OF THE ACTION TO DATE

1) The Parties

8. 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 Private Transportation Company ("**PTC**") industries in the City of Ottawa.[1]

9. The Plaintiff, Metro Taxi Ltd. ("**Metro**"), operates under the business name "Capital Taxi" within the geographic limits of the City of Ottawa.[2] Metro holds a taxi broker license in accordance with the 2016 By-law.[3]

10. The Plaintiff, Marc André Way ("**Mr. Way**"), is the President, Chief Executive Officer and co-owner of Metro.[4] Mr. Way (either personally or through a corporate entity) holds standard and accessible taxi plate holder licenses.[5]

11. The Plaintiff, Iskhak Mail ("**Mr. Mail**"), is a former plate holder in the City of Ottawa.[6]

2) The Action

12. 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, collectively the "**Plaintiffs**") initiated a claim on August 12, 2016 for damages against the City under the CPA. The claim was later amended to include Mr. Mail as a representative plaintiff.[7]

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[1] Statement of Agreed Facts, dated December 28, 2022 at paras. 2, 5 and 31, Case Center Master pp. F1 and F6-7 ["Statement of Agreed Facts"]; *Metro Taxi Ltd. et. al. v. City of Ottawa*, 2024 ONSC 2725 at paras. 23 and 33 ["Liability Decision"].
[2] See Amended Amended Statement of Claim at para. 3, Case Center Master p. A248; see also Marc André Way, Examination in Chief, January 5, 2023, p. 66, lines 21-26, Case Center Master p. A3226.
[3] See Amended Amended Statement of Claim at para. 3, Case Center Master p. A248; see also Marc André Way, Examination in Chief, January 5, 2023, p. 99, lines 3-10, Case Center Master p. A3259.
[4] Marc André Way, Examination in Chief, January 5, 2023, p. 66, lines 30 – 32, Case Center Master p. A3226.
[5] Exhibit 1, Tab 131, Plate Holder Renewal Statistics, Case Center Master p. F84;
[6] Liability Decision, 2024 ONSC 2725 at para. 14(iii).
[7] Amended Amended Statement of Claim, Case Center Master pp. A245-61.

13. 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 R. 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**"].[8]

14. Justice R. 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**"][9]

[8] *Metro Taxi Ltd. v. City of (Ottawa)*, 2018 ONSC 509 at para. 57 ["Certification Decision"].
[9] Certification Decision, 2018 ONSC 509 at para. 83.

15. Common Issue 2 was dismissed on consent at the commencement of trial, without prejudice to the City's ability to seek costs related to the dismissal.[10]

3) Phase 1 of the Trial and the Liability Decision

16. 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.[11]

17. On the Plaintiffs' motion, Common Issue 5 was adjourned until a second phase of trial, which was to be heard only if the City was found liable.[12] The City opposed the Plaintiffs' motion.[13]

18. On May 13, 2024, Justice M. Smith issued a decision with respect to Common Issues 1, 3 and 4 (the "**Liability Decision**"), answering them as follows:

> *i.* Common Issue #1 – the City was negligent in enforcing the 2012 By-law from September 1, 2014 to September 30, 2016;
>
> *ii.* Common Issue #3 – the City's conduct in allegedly negligently enforcing the 2012 By-law or in amending the taxi by-law in 2016 did not infringe on the rights of the taxi plate holders under s. 15 of the *Charter* or under s. 3 of the *Code*;
>
> *iii.* Common Issue #4 – the fees collected by the City under its taxi by-law do not constitute an unlawful tax.[14] [*emphasis in original*]

4) Developments in Advance of Phase 2

19. On February 5, 2025, the parties wrote to the Court to advise as follows:

> Each party has advised the other that it does not intend to call its respective expert. The parties will rely on the evidence already tendered at trial. The Plaintiffs will not rely on the expert evidence of Mr. McEvoy.
>
> The Plaintiffs have advised the defendant that the Plaintiffs will not be pursuing the remedy of aggregate damages at it concerns the second certified class, namely the class of brokers. For the members of the Broker Class, the Plaintiffs will seek individualized damages.

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[10] Liability Decision, 2024 ONSC 2725 at para. 9.
[11] See generally Liability Decision, 2024 ONSC 2725.
[12] Liability Decision, 2024 ONSC 2725 at para. 10.
[13] Trial Transcript, Motion Submissions from the City, January 23, 2023, p. 47, line 30 – p. 67, line 12, Case Center Master pp. A4621-41.
[14] Liability Decision, 2024 ONSC 2725 at para. 461.

COMMON ISSUE 5: Are damages assessed in the aggregate an appropriate remedy?

20. As the Plaintiffs are no longer seeking aggregate damages for the Broker Class, these submissions only address Common Issue 5 as it pertains to the Plate Holder Class. There are 768 members of this class, who collectively hold the licenses for the 1,188 taxi plate licenses issued by the City of Ottawa.[15]

1) <u>The Plaintiffs have not satisfied the burden of establishing that aggregate damages are reasonable</u>

A) The Plaintiffs' burden

21. The Court's authority to award aggregate damages in class proceedings in Ontario is set out under section 24(1) of the CPA, which provides:

> **Aggregate assessment of monetary relief**
>
> 24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

22. This provision "does not create a new type of damages."[16] It simply empowers the Court, in certain circumstances, to avoid assessing damages on an individualized basis.[17] Instead, through a "top

[15] Liability Decision, 2024 ONSC 2725 at para. 7.
[16] *Spina v. Shoppers Drug Mart Inc.*, 2023 ONSC 1086 at para. 635 [*Spina* (Ont Sup Ct)]; affirmed with respect to the determination that aggregate damages were not appropriate 2024 ONCA 642 at para. 202 [*Spina* (ONCA)].
[17] *Spina* (Ont Sup Ct), 2023 ONSC 1086 at para. 635; aff'd *Spina* (ONCA), 2024 ONCA 642; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 126 [*Fulawka*]

down" or "global" approach, the Court is empowered (but not required) to calculate damages that are "equal to what the defendant would have to pay if there were individual assessments."[18]

23. The City agrees that the Courts have generally accepted Justice Belobaba's statement in *Ramdath v. George Brown College* that aggregate damages should be "more the norm than the exception" in class proceedings:

> Aggregate damages are essential to the continuing viability of the class action. If all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members, then class action judges should do so routinely and without hesitation. Aggregate damage awards should be more the norm, than the exception. Otherwise, the potential of the class action for enhancing access to justice will not be realized.[19] [*emphasis added*]

24. However, the parties differ with respect to when aggregate damages are appropriate. The Plaintiffs urge this Court to view the award of aggregate damages as a default instead of applying the requisite test and attempt to shift their burden to the City to demonstrate a basis for "deviating" from aggregate damages.[20] This does not reflect the approach adopted by the Courts.

25. Rather, as Justice Perell explained in *Spina v. Shoppers Drug Mart*, the burden is on the Plaintiffs to prove a viable methodology for fairly and reasonably determining damages in the aggregate. Damages cannot be awarded in the aggregate if the Plaintiffs do not satisfy their burden:

> I agree with Justice Belobaba's statement [*at paragraph 1 of Ramdath*], but the statement's conditional modality needs to be kept in mind. Aggregate damages should be available if all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members and if there is a viable methodology. In the immediate case, the defendant's monetary liability cannot be determined without proof by individual members. Fairness and reasonability is not possible in the immediate case because the Plaintiffs have not proven a fair and reasonable global top-down methodology that would be a surrogate or equivalence for what would undoubtedly be a fair and reasonable outcome if a bottom-up methodology were utilized. [*emphasis added*][21]

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[18] *Spina* (Ont Sup Ct), 2023 ONSC 1086 at para. 635; aff'd *Spina* (ONCA), 2024 ONCA 642; *Fulawka*, 2012 ONCA 443 at para. 126.
[19] Plaintiffs' Written Submissions, dated March 7, 2024 at para. 19, Case Center Master p. A7744 [Plaintiff's Written Submissions], citing *Ramdath v. George Brown College,* 2014 ONSC 3066 at para. 1 [*Ramdath* (Ont Sup Ct); a'ffd in part 2015 ONCA 921 [*Ramdath* (ONCA).
[20] Plaintiffs' Written Submissions, para 3, Case Center Master p. A7738.
[21] *Spina* (Ont Sup Ct), 2023 ONSC 1086 at para. 657.

26. In *Ramdath*, Justice Belobaba articulated three factors or criteria that should guide the Court's analysis of whether the Plaintiffs have proven a viable methodology that fairly and reasonably determines aggregate damages:

(a) Whether the non-individualized evidence presented by the plaintiff is sufficiently reliable;

(b) Whether the use of this evidence will result in any unfairness or injustice to the defendant, such as overstatement of its liability;

(c) Whether the denial of an aggregate approach will result in "a wrong eluding an effective remedy" and a denial of access to justice.[22]

27. These three "*Ramdath* factors" remain the governing law with respect to aggregate damages.[23]

28. In their submissions, the Plaintiffs cite the *Ramdath* factors.[24] However, the Plaintiffs proceed to immediately misstate them, instead arguing that:

> In this case, damages for the plate owner class can reasonably be determined in the aggregate. This is for four reasons: (1) the appropriate measure of damages is amenable to being calculated in the aggregate; (2) the City's negligence was the same for all plate owners and, therefore, determining damages in the aggregate is reasonable; (3) the data is sufficiently reliable to determine reasonably and fairly damages in the aggregate; and (4) determining damages in the aggregate is the only fair and workable method of calculating damages.[25]

29. Notably, of these four reasons, only reason 3 is connected to the *Ramdath* criteria. Reasons 1, 2 and 4 listed by the Plaintiffs do not address the criteria set out by Justice Belobaba. The Plaintiffs structure their submissions based on this incorrect articulation of the relevant factors, and in so doing, fail to address the criteria established by the Courts.

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[22] *Ramdath* (Ont Sup Ct), 2014 ONSC 3066 at para. 47; affirmed *Ramdath* (ONCA), 2015 ONCA 921 at para. 76.
[23] *Spina* (ONCA), 2024 ONCA 642 at para. 199.
[24] Plaintiffs' Written Submissions at para. 23, Case Center Master p. A7745-46, citing Justice Perrell's restatement of the *Ramdath* factors in *Bernstein v. Peoples' Trust Company*, 2019 ONSC 2867 at para. 301 ["*Bernstein*"].
[25] Plaintiffs' Written Submissions at para. 24, Case Center Master p. A7746.

B) The Plaintiffs have not satisfied their burden

30. The Plaintiffs cannot satisfy their burden of proving an expert methodology for fairly and reasonably determining damages in the aggregate. Indeed, they do not propose any methodology. On this basis alone, the Court should decline to award damages in the aggregate.

31. Instead of advancing a methodology for determining damages in the aggregate, the Plaintiffs state:

> [*After any appeal is decided*,] when the proceeding reaches [*the damage quantification*] stage, the representative plaintiffs will obtain an expert report on the plate owners' damages. There is no evidence to suggest that such an expert opinion cannot be obtained or that it will not be based on sufficiently reliable data.[26]

32. Later in their written submissions, the Plaintiffs argue that the City's dataset containing plate transfer transactions is reliable,[27] and suggest that this dataset could be used by the experts retained to quantify damages.[28]

33. In advancing these arguments, the Plaintiffs confuse the standard at the *certification* stage with the standard required at the *trial* phase. The Plaintiffs' failure to advance expert evidence for determining aggregate damages typically does not satisfy the burden required at the certification stage, let alone the burden required at trial.

The Plaintiffs' burden at certification

34. As Justice Belobaba explained in *Fresco v. Canadian Imperial Bank of Commerce*, at the certification stage of class proceedings, plaintiffs need only establish that there is a reasonable basis to believe their expert's methodology can determine aggregate damages without proof by individual class members.[29] However, to assess reasonability at the certification stage, the Plaintiffs were required to

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[26] Plaintiffs' Written Submissions at para. 4, Case Center Master pp. A7738-39.
[27] Plaintiffs' Written Submissions at para. 45, Case Center Master p. A7752.
[28] Plaintiffs' Written Submissions at para. 50, Case Center Master p. A7754.
[29] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 at paras. 26-29 [*Fresco* (Ont Sup Ct)]; aff'd 2022 ONCA 115 [*Fresco* (ONCA)].

propose an expert methodology to certify Common Issue 5. They failed to do so then and continue to do so now.

35. The significance of the Plaintiffs' failure to propose an expert methodology at certification is evident when considering the *Pro-Sys Consultants Ltd. v. Microsoft Corporation* case. In that case, the Supreme Court of Canada emphasized the following: "[t]he loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established."[30] Therefore, in response to the question of whether aggregate damages could be certified as a common issue, the plaintiffs in *Pro-Sys* successfully met their burden by proffering two experts setting out three methodologies.[31]

36. Yet in this case, aggregate damages was certified as a common issue, despite the Plaintiffs' failure to tender "...any evidence of an expert methodology that has a realistic prospect of determining the loss on a class-wide basis".[32] This is an atypical approach not consistent with the case law.

The Plaintiffs' burden at trial

37. At trial, the Court is required to consider the proposed expert methodology as applied to the evidence and undertake a "merit-based analysis" to determine whether damages can be fairly and reasonably determined in the aggregate, guided by the *Ramdath* factors.[33] At the trial stage, "questions about reliability and overall fairness to the defendant are paramount."[34] The mere fact that the aggregate damages question is certified as a common issue does not mean that the same question will be answered in favour of the Plaintiffs when it is considered on the merits.[35]

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[30] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 113 [*Pro-Sys*][*emphasis added*].
[31] *Pro-Sys*, 2013 SCC 57 at paras. 120 and 125.
[32] Certification Decision, 2018 ONSC 509 at para. 81.
[33] *Fresco* (Ont Sup Ct), 2020 ONSC 4288 at paras. 29-31 ; aff'd *Fresco* (ONCA), 2022 ONCA 115.
[34] *Fresco* (Ont Sup Ct), 2020 ONSC 4288 at para. 29 [*emphasis added*]; aff'd *Fresco* (ONCA), 2022 ONCA 115.
[35] *Fresco* (Ont Supt Ct), 2020 ONSC 4288 at para. 32; aff'd *Fresco* (ONCA), 2022 ONCA 115.

38. In other words, comparing the Plaintiffs' burden from certification to trial, the standard for evaluating the Plaintiffs' expert methodology heightens:

(a) From demonstrating a "reasonable likelihood" that their expert's method can determine aggregate damages without individual proof;

(b) To demonstrating that damages can, on balance, be "fairly and reasonably determined" in the aggregate without individual proof.

39. Expert evidence is generally required where the Court is faced with issues that are likely to be outside the experience or knowledge of the judge.[36] The issue of whether a given methodology for calculating aggregate damages is fair and reasonable is one that tends to fall outside the Court's experience or knowledge and therefore requires the tendering of expert reports. By way of example, in *Fresco,* Justice Belobaba held that the common issue of "whether aggregate damages can reasonably and fairly be determined and if so what amount" could not be decided until the Plaintiffs' damages expert had completed his proposed report.[37]

40. The Plaintiffs are aware of the general requirement for expert evidence. In their written submissions, the Plaintiffs rely on three merits decisions (as opposed to certification decisions) that involve class proceedings: *Bernstein v. Peoples' Trust Company*, *Ramdath*, and *Metellus v. Procureur général du Québec.*[38] In all three cases, the issue of whether damages could be awarded in the aggregate was decided with the benefit of an expert's opinion.

41. The Plaintiffs' burden has heightened from certification to trial. At the certification stage, the Plaintiffs were required to proffer expert evidence of a methodology to support their claim that damages

[36] *R. v. Mohan*, [1994] 2 SCR 9 at p. 25; *Krawchuck v Scherbak,* 2011 ONCA 352 at para. 133.
[37] *Fresco* (Ont Sup Ct), 2020 ONSC 4288 at para. 46.
[38] *Bernstein*, 2019 ONSC 2867; *Ramdath* (Ont Sup Ct), 2014 ONSC 3066; aff'd in part *Ramdath* (ONCA), 2015 ONCA 921; *Metellus v. Procureur général du Québec*, 2024 QCCS 2388.

can be assessed in the aggregate. They failed to produce a methodology, and they failed to produce a damages expert.

42. Despite this, the Plaintiffs have been afforded a second chance to meet their burden. At the trial stage, the expert methodology, which was not tendered at certification, must be tested against all the evidence. However, although they claim to be "ready, willing, and able to tender the required evidence"[39] and assert that "[t]here is no evidence to suggest that such an expert opinion cannot be obtained",[40] the Plaintiffs continue to have no expert and no methodology. Instead, they once again claim that an expert will be provided at the next stage. The buck stops here.

43. In short, the Plaintiffs fail to propose a methodology for determining damages in the aggregate. The Plaintiffs cannot prove that their proposed (yet undefined) methodology satisfies the required criteria of reliability, reasonableness, and fairness to the defendant. On this basis, the Court should decline to award damages in the aggregate and prevent the Plaintiffs from evading their evidentiary obligation.

2) <u>Applying the *Ramdath* criteria</u>

44. At paragraph 29 of their written submissions, the Plaintiffs reference "an approach to measuring damages that is based on the diminution of plate value that was caused by the City's negligence". The Plaintiffs seem to suggest that this approach constitutes a methodology supporting aggregate damages.[41] This is not the case. Even if it was accepted as a methodology, it would not be sufficient to satisfy the statutory test when assessed against the *Ramdath* factors.

[39] Plaintiffs' Written Submissions at para. 53, Case Center Master pp. A7754-55.
[40] Plaintiffs' Written Submissions at para. 4, Case Center Master pp. A7738-39.
[41] Plaintiffs' Written Submissions at paras. 26 and 29, Case Center Master pp. A7746-48.

A) Factor 1: The non-individualized evidence is not sufficiently reliable

45. The Plaintiffs contend that damages should be awarded in the aggregate based on the alleged loss in the fair market value of taxi plates, with losses calculated based on the record of plate transfers between July 2012 and October 2018 as attached at Appendix "A" to the Statement of Agreed Facts ("**Appendix "A"**").[42] This approach fails to satisfy the reliability criterion for several reasons:

(a) The evidence is *qualitatively* unreliable. It is uncontroverted that the plate transfer values set out in Appendix "A" are inaccurate.

(b) The evidence is *quantitatively* unreliable. There are not enough data points to establish an overall loss of fair market value during the Loss Period.

(c) An aggregate approach to damages based on loss of plate value rests on unreliable assumptions, as it assumes that all plate holders value and utilize the plate in the same way. This does not account for the differences (such as individual business models and inherent variability of plate licenses) that drive plate value, and hence the resulting volatility in plate values.

I. The evidence of plate transfer values is qualitatively unreliable

46. The Court will award aggregate damages for costs that can "reliably be determined without individual proof by class members." It will not award damages that are "not supported by credible evidence," are "an arbitrary approximation," or damages that rest on "unreliable assumptions."[43]

47. Justice Belobaba's aggregate damages decision in *Ramdath* illustrates how the reliability of evidence is to be evaluated. This decision followed the common issues trial, at which, the defendant

[42] Statement of Agreed Facts, Appendix A, Case Center Master pp. F17-23; Plaintiffs' Written Submissions at paras. 10 and 45, Case Center Master pp. A7741 and A7752.
[43] *Ramdath* (Ont Sup Ct), 2014 ONSC 3066 at paras. 58 and 66.

George Brown College ("GBC") was found liable for negligent misrepresentation and unfair practice under the *Consumer Protection Act* after falsely claiming that graduates from its International Business Management Program would be awarded certain industry designations upon completion.

48. Justice Belobaba found that certain categories of direct costs were imposed on all class members and therefore could be awarded in the aggregate. These costs were either not in dispute, or were supported by uncontroverted evidence:

(a) Application, administration and tuition fees – not in dispute.

(b) Student association and other fees – not in dispute.

(c) Health and medical insurance fees for foreign students – not in dispute.

(d) Textbook and supply fees – Justice Belobaba determined an average cost based on the Plaintiffs' uncontroverted evidence; and

(e) Air travel costs for foreign students – established based on the Plaintiffs' uncontroverted evidence.[44]

49. In contrast, Justice Belobaba declined to award aggregate damages for categories including:

(a) Visas, immigration consultants and "other fees" – refused on the basis that they were premised on an "arbitrary approximation".

(b) Losses for delayed entry into the workforce – refused on the basis that the plaintiffs' methodology "rests on unreliable assumptions".[45]

[44] *Ramdath* (Ont Sup Ct), 2014 ONSC 3066 at paras. 56.
[45] *Ramdath* (Ont Sup Ct), 2014 ONSC 3066 at paras. 58 and 64-66.

50. In the instant case, it is uncontroverted that the plate transfer values listed at Appendix "A" are unreliable. To begin with, the parties agree that:

> The list [*Appendix A of the Statement of Agreed Facts*] does not, in all cases, necessarily reflect the true consideration agreed upon or paid as between the transferor and the transferee, nor does it describe the circumstances in which the plate holder license transfer requests were made. [*emphasis added*][46]

51. A finding of fact to this effect was made in the Liability Decision.[47]

52. The Plaintiffs attempt to escape this finding by suggesting that the City never expressed concern over the veracity of the transfer values. This argument is misleading for several reasons:

(a) The parties agree, and Justice M. Smith found, that the nature and quantum of plate transfers was determined between the transferor and transferee, without the involvement or oversight of the City;[48]

(b) The parties agree, and Justice M. Smith found, that the City's involvement in plate transfers was limited to regulatory oversight of the proposed transfer and the collection of transfer fees;[49] and

(c) At all material times, the transferee and transferor of a plate license were required to file an executed copy of the written sale agreement, and affidavits setting out the true consideration exchanged.[50] In light of the City's limited role with respect to plate transfers, there is no basis to shift the onus of verifying the veracity of reported transfers to the City.

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[46] Statement of Agreed Facts at para. 24, Case Center Master p. F5.
[47] Liability Decision, 2024 ONSC 2725 at para. 39.
[48] Statement of Agreed Facts at para. 22, Case Center Master p. F5; Liability Decision, 2024 ONSC 2725 at para. 38.
[49] Statement of Agreed Facts at para. 21, Case Center Master p. F5; Liability Decision, 2024 ONSC 2725 at para. 37.
[50] Exhibit 2, Tab 306, ss. 91(2) and 92(2), pp. F3935-F3936.

53. The Plaintiffs contend that "there is no evidence that the under-reporting of sale amounts was widespread or involves significant amounts."[51] This is simply not accurate. Of the five fact witnesses called by the Plaintiffs, four reported false transfer values to the City, as follows:

Table 1: Comparison of Reported versus Actual Transfer Values

Witness	Transfer Value Reported to City	Evidence of Actual Transfer Value
Ziad Mezher	$20,000[52]	$50,000[53]
Yeshitla Dadi	$199,689.54[54]	Approximately $210,000[55]
Antoine El-Feghaly	$150,000[56]	Approximately $320,000[57]
Iskhak Mail	$150,000[58]	Approximately $325,000[59]

54. The Plaintiffs' witnesses Mr. Mail and Mr. Way also provided evidence that they were aware that the reporting of false transfer values was widespread.[60]

55. The Plaintiffs' contention that this false reporting would assist the City is speculative and based on unsupported claims about the timing of false reporting and the prevalence of under-reporting vs. over-reporting. They should be given no weight. Fundamentally, the uncontroverted evidence before the Court demonstrates that:

[51] Plaintiffs' Written Submissions at para. 48, Case Center Master p. A7753.
[52] Exhibit 66, Plate Transfer Filings – Ziad Mezher, Case Center Master p. F1133.
[53] Ziad Mezher, Examination in Chief, January 18, 2023 at p.7, line 7 – p.8, line 4, Case Center Master pp. A4191-92.
[54] Exhibit 81, Yeshitla Dadi Plate Transfer Documents, Case Center Master pp. F1126.
[55] Yeshitla Dadi, Examination in Chief, January 23, 2023 at p.102, lines 10-17, Case Center Master p. A4676.
[56] Exhibit 98, Antoine El-Feghaly Plate Transfer Documents, Case Center Master, p. F1141.
[57] Antoine El-Feghaly, Examination in Chief, January 25, 2023 at p. 86, lines 7-11, Case Center Master p. A4964.
[58] Exhibit 72, Iskhak Mail Plate Transfer Records, Case Center Master p. F442.
[59] Iskhak Mail, Examination in Chief, January 18, 2023 at p. 117, lines 16 –26, Case Center Master p. A4301.
[60] Read in to Iskhak Mail, Cross-Examination, January 19, 2023 at p. 77, line 3 –17, Case Center Master p. A4404; Iskhak Mail, Cross-Examination, January 19, 2023 at p. 80, lines 14-30, Case Center Master p. A4407; Cross-examination of Marc Andre Way, January 12, 2023, p. 83 line 9 – p. 84, line 9, Case Center Master pp. A3852-53; Certification Decision, 2018 ONSC 509 at para. 76.

(a) Reporting of false transfer values was widespread; and

(b) The transfer values listed in Appendix "A" of the Statement of Agreed Facts cannot be relied upon.

56. As such, these transfer values are not sufficiently reliable to support a model of damages in the aggregate without proof by individual class members.

II. The evidence is quantitatively unreliable

57. The City was only found liable with respect to Common Issue 1, meaning that its liability began September 1, 2014 and ended on September 30, 2016.[61] The Loss Period is therefore restricted to this period.

58. Out of the 1,188 plate licenses in circulation in Ottawa, 1,001 are non-accessible ("**standard**" plates).[62] As 84% of plates are standard, the bulk of damages for any claim relating to loss in fair market value of taxi plate licenses must necessarily stem from a diminution in the value of these standard plates.

59. There is insufficient evidence to establish a loss in fair market value of standard plates during the Loss Period. Using the dataset the Plaintiffs suggest, there were only five standard plate transactions during the Loss Period. The dollar value of those five transactions does not indicate a loss in plate value.

60. Excluding plate transfers which occurred at transfer values of $1, or between parties with the same name (both of which presumably do not represent arms length transfers), there were only five transfers of standard plates between September 1, 2014 and September 30, 2016:[63]

[61] Liability Decision, 2024 ONSC 2725 at para. 461.
[62] Statement of Agreed Facts at para. 20, Case Center Master pp. F4-5; Liability Decision, 2024 ONSC 2725 at para. 32.
[63] Statement of Agreed Facts, Appendix "A", Case Center Master pp. F17-20.

Date	Plate #	Transaction Price
27-Oct-14	725	$ 170,000
10-Jun-15	903	$ 190,000
10-Jun-15	853	$ 250,000
16-Dec-15	422	$ 137,000
26-Jan-16	819	$ 140,000
Average Price		$ 177,400

61. These five transactions represent 0.5% of the 1,001 standard plates in circulation. Such a tiny sample size is not sufficiently statistically significant to allow the calculation of damages in the aggregate.

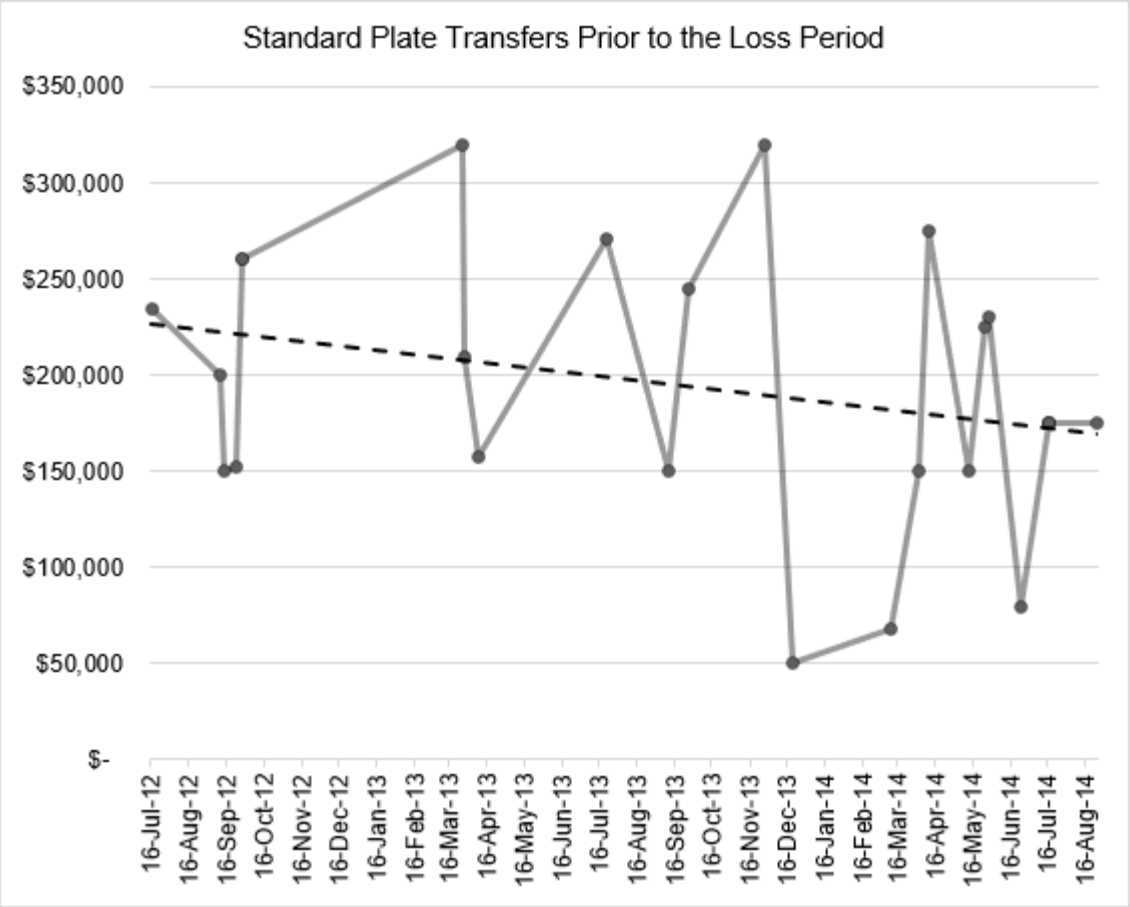
62. Moreover, these five transactions do not demonstrate any actual loss in the pre-Uber fair market value of standard taxi plates. Again, excluding transfers at values of $1 and those between parties with the same name, the following transfers of standard plates occurred in the (approximate) two-year period before Uber's entry into the Ottawa market:[64]

[64] Statement of Agreed Facts, Appendix "A", Case Center Master pp. F17-20.

Date	Plate #	Transaction Price
16-Jul-12	910	$ 235,000
11-Sep-12	201	$ 200,000
13-Sep-12	530	$ 150,000
24-Sep-12	413	$ 152,500
28-Sep-12	402	$ 260,000
27-Mar-13	737	$ 320,000
28-Mar-13	424	$ 210,000
08-Apr-13	504	$ 157,000
22-Jul-13	873	$ 271,200
11-Sep-13	525	$ 150,000
27-Sep-13	353	$ 245,000
28-Nov-13	510	$ 320,000
20-Dec-13	719	$ 50,000
11-Mar-14	322	$ 68,000
03-Apr-14	648	$ 150,000
11-Apr-14	717	$ 275,000
13-May-14	814	$ 150,000
26-May-14	821	$ 225,000
30-May-14	457	$ 230,000
24-Jun-14	411	$ 79,500
17-Jul-14	184	$ 175,000
17-Jul-14	61	$ 175,000
17-Jul-14	199	$ 175,000
26-Aug-14	189	$ 175,000
Avg 24 months prior to Uber's arrival		$ 189,704
Avg 18 months prior to Uber's arrival		$ 189,511
Avg 12 months prior to Uber's arrival		$ 176,167
Avg 6 months prior to Uber's arrival		$ 170,682

63. The above table demonstrates that the average transfer value of standard plates during the Loss Period exceeds the average transfer value during the 12-month and 6-month periods before Uber's arrival in Ottawa.

64. Put differently, transfer prices for standard plates were already declining in the leadup to Uber's arrival in Ottawa, likely due to the taxi industry's knowledge of Uber's impending arrival.[65] This is illustrated in the graph below:



65. Average transfer prices then *increased* during the Loss Period.

66. Notably, the average transfer value for standard plates during the Loss Period also exceeds the fair market value (based on cash flow) and aligns with the fair market value (based on liquidation) estimated by Dave Clarke of Collins Barrow Ottawa LLP, in his valuation report of Metro, dated April 21, 2015 (the "**Collins Barrow Report**"). In that report, Mr. Clarke estimated the following fair market values, per standard plate, as at the valuation date of February 22, 2014:

[65] Liability Decision, 2024 ONSC 2725 at paras. 196, 198 and 199.

(a) Fair market value based on cash flows: $51,552.87;[66] and

(b) Fair market value based on liquidation of $171,000 to $189,000.[67]

67. Mr. Way agreed that Collins Barrow is a reputable firm, that Mr. Clarke is a reputable accountant, that he is a qualified chartered business valuator, and that Mr. Way had no concern about Mr. Clarke's qualifications.[68]

68. Finally, the average transfer value during the Loss Period is nearly 55% higher than the fair market value of $115,000 estimated by Mr. Way himself, as Metro's management (as of February 22, 2014), which was set out in the Collins Barrow Report.[69]

69. There are 1,188 plates in total, 1,001 of which are standard plates. Adopting the approach that the Plaintiffs are suggesting results in no loss for 84% of the Plaintiffs.

70. In short, the evidence upon which the Plaintiffs propose to base their calculations of aggregate damages is not reliable since it is not statistically significant at 0.5% of total standard plates.

III. The non-individualized evidence does not account for idiosyncrasies in plate values

71. Aggregate damages are not appropriate "where the damage incurred by each class member necessarily depends on idiosyncratic factors specific to them that are impossible to generalize or extrapolate in a reliable way across the entire class."[70] In this case, the Plaintiffs' proposal to calculate damages on the alleged loss of fair market value of plates does not sufficiently account for idiosyncratic

[66] Exhibit 35, Collins Barrow Report, February 22, 2014, Schedules B and F, Case Center Master pp. F3588 and F3594 ["Exhibit 35, Collins Barrow Report"].
[67] Exhibit 35, Collins Barrow Report, Schedule F, Case Center Master p. F3594.
[68] Marc André Way, Cross-Examination, January 11, 2023 at p. 25, lines 4-16, Case Center Master p. A3634.
[69] Marc André Way, Cross-Examination, January 11, 2023 at p. 25, lines 4-16, Case Center Master p. A3634; Exhibit 35, Collins Barrow Report, Schedule F, Case Center Master p. F3594.
[70] *Spina* (ONCA), 2024 ONCA 642 at para. 210.

factors including: differences in business models and cash flow between individual Plaintiffs, and the inherent variability of plate licenses as an asset class.

72. Justice Perell's decision in *Spina* illustrates the role of idiosyncrasies in the evaluation of whether aggregate damages are appropriate. In *Spina,* the plaintiff franchisees brought a claim against the defendant franchisor Shoppers Drug Mart ("SDM") based on non-payment of professional allowances and overpayment of various fees. The plaintiffs advanced an expert methodology for determining damages in the aggregate for three heads of damages: (a) charging of unauthorized Optimum fees; (b) overcharging Shoppers Fees; and (c) failing to remit Professional Allowances. At trial, Justice Perrell ruled against SDM on some of the issues but found that aggregate damages were not appropriate.[71]

73. Justice Perell's finding that aggregate damages were not appropriate hinged on the idiosyncratic factors specific to individual plaintiffs. The damages suffered by individual plaintiffs varied depending on factors including: the quantity and type of drugs dispensed by an individual store each year; that individual store's expenses; and the different rates of allocation of Professional Allowances to individual pharmacists and SDM.[72] Addressing these idiosyncrasies, Justice Perell found that:

> Aggregate damages should be available if all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members and if there is a viable methodology. In the immediate case, the defendant's monetary liability cannot be determined without proof by individual members. Fairness and reasonability is not possible in the immediate case because the Plaintiffs have not proven a fair and reasonable global top-down methodology that would be a surrogate or equivalence for what would undoubtedly be a fair and reasonable outcome if a bottom-up methodology were utilized. [*emphasis added*][73]

74. The Court of Appeal upheld Justice Perell's decision on appeal, and, citing *Ramdath*, cautioned that:

[71] *Spina* (ONSC), 2023 ONSC 1086 at para. 675.
[72] See generally *Spina* (ONSC), 2023 ONSC 1086.
[73] *Spina* (ONSC), 2023 ONSC 1086 at para. 657.

> Where the damage incurred by each class member necessarily depends on idiosyncratic factors specific to them that are impossible to generalize or extrapolate in a reliable way across the entire class, a top-down aggregate damages assessment has been held to be inappropriate.[74]

75. In the instant case, plate values are too variable and idiosyncratic to serve as a basis for an award of aggregate damages. While the Plaintiffs argue that conducting individualized hearings would give rise to the risk that different plate holders will "receive different compensation for the exact same asset,"[75] the evidence demonstrates that as an asset class, plate holders already receive different compensation for the exact same asset in the real market.

76. For example, the following plate transfers for the exact same asset occurred within an eighteen-day span in September 2012, two years prior to Uber's arrival in Ottawa:[76]

Date	Plate #	Transaction Price	% Change from Prior Transaction
11-Sep-12	201	$ 200,000	
13-Sep-12	530	$ 150,000	(25.00%)
24-Sep-12	413	$ 152,500	1.67%
28-Sep-12	402	$ 260,000	70.49%

77. Plate transfers are negotiated directly between the transferee and the transferor.[77] Due to the inherent differences and variability of individual negotiations, plate holders have always received "different compensation for the exact same asset."

78. Moreover, the evidence demonstrates that the valuation of plate licenses is itself highly variable, depending on the method used. By way of example, the Collins Barrow Report contains numerous and highly variable figures for standard plate valuation. Namely, the report states that:

[74] *Spina* (ONCA), 2024 ONCA 642 at para. 210.
[75] Plaintiffs' Written Submissions at para. 6, Case Center Master p. A7739.
[76] Statement of Agreed Facts, Appendix "A", Case Center Master pp. F17-20.
[77] Marc André Way, Examination in Chief, January 10, 2023 at p. 32, lines 9-27, Case Center Master pp. A3496.

(a) Fair market value based on cash flows is estimated at $51,552.87 per plate;[78]

(b) Fair market value based on liquidation is estimated at $171,000 to $189,000 per plate;[79]

(c) Fair market value based on "management estimates" is $115,000 per plate (as at February 22, 2014);[80] and

(d) Market value based on "industry research and court cases" is estimated between $150,000 and $300,000 in 2012.[81]

79. Given the variability of transaction values and methods, the fair market value of plate licenses cannot be reliably determined from a statistically small and highly variable set of transactions.

B) Factor 2: The proposed approach will overstate the City's liability

80. Aggregate damages will only be available if the Court is satisfied that the Plaintiffs have proven a methodology whereby damages calculated in the aggregate will be "equal to or less than the amount of damages that the defendant would pay if there were individual assessments."[82]

81. While the Plaintiffs have failed to proffer expert evidence of a methodology, their proposed approach of calculating aggregate damages based on reduction in plate value will overstate the City's liability for the following reasons:

(a) It implicitly and incorrectly assumes that all plate licenses could have been liquidated simultaneously, without negatively impacting their value; and

[78] Exhibit 35, Collins Barrow Report, Schedule A, Case Center Master p. F3585.
[79] Exhibit 35, Collins Barrow Report, Schedule F, Case Center Master p. F3594.
[80] Exhibit 35, Collins Barrow Report, Schedule F, Case Center Master p. F3594.
[81] Exhibit 35, Collins Barrow Report, Schedule F, Case Center Master p. F3594.
[82] *Healey v. Lakeridge Health Corp*., 2010 ONSC 725 at para. 284; aff'd 2011 ONCA 55 and cited in *Ramdath* (ONCA), 2015 ONCA 921 at para. 76.

(b) The evidence the Plaintiffs are arguing should be used to calculate a loss in plate value does not demonstrate a reduction in plate value for 84% of plate holders during the Loss Period.

82. As such, to the extent that the Plaintiffs suffered losses, a loss of income analysis more reasonably reflects those losses. This is inherently individualized, and depends on the circumstances of each plate holder, particularly because multi-plate holders did not lose income during the Loss Period.

I. Awarding aggregate damages based on loss of plate value assumes all plates could have been liquidated simultaneously

83. An award of damages to all plate holders based on a reduction in the fair market value of plate licenses implicitly assumes that "but for" the City's actions, all plate holders could have liquidated their plates at a higher, pre-negligence value. Such an assumption is at odds with the evidence and would vastly overstate the Plaintiffs' damages.

84. It is uncontroverted that the market value of plate licenses is based purely on supply and demand. In the following excerpt from his examination for discovery, which was read in at trial, Mr. Way stated:

> Question 732: Okay. How would the market go about to dictate the price of a plate?
>
> Answer: It was basically supply and demand. Drivers who wanted to purchase a plate versus drivers who were people who were interested in selling plates.
>
> Question 733: So it's as you can agree on price wise.
>
> Answer: That's right.[83]

[83] Read-in from Marc André Way, Examination for Discovery, Vol.2, p. 177, qq. 732-733, February 10, 2023 at p. 123, Case Center Master p. A6707.

85. Similarly, Mr. Mail explained that he did not have his plate license appraised because "[t]he appraisal of the plate was depend [*sic*] of the demand on the market. It's not something which is set by rule or regulation, it was how much demand was in the market."[84]

86. The Collins Barrow Report also recognized and accounted for the illiquid nature of plate licenses as a thinly traded asset class, stating that:

> In addition, given that the Ottawa Taxi Plate resale market is extremely thin, since few plates have been trading since 2012, it is unlikely the Company could release 86 plates on the market without significantly impairing the value of all licenses on the market (i.e. there would be a blockage in the market as a result of the bulk sale of the plates). Accordingly, we have assumed that, in a wind-down scenario, the Company could release six plates a year without seriously impairing the market. [*emphasis added*][85]

87. Six plates per year represents roughly 7% of Metro's total holdings at the time of 86 plates. The Collins Barrow Report establishes that only a very limited number of plates can be liquidated each year without significantly impairing the value of all licenses on the market.

88. Awarding damages in the aggregate based on the diminution in value of *all* plates artificially ignores the illiquidity of the plate license market and thereby inflates the City's damages.

II. No evidence of diminution in plate value during the Loss Period

89. As set out above, the evidence demonstrates no actual diminution in plate values *during the Loss Period*. Instead, the plate transfers listed in Appendix A show several distinct periods of change and stasis with respect to the average transfer value of standard plates:[86]

(a) Average plate transfer values declined consistently in the two years *before* Uber's arrival in Ottawa, as follows:

[84] Iskhak Mail, Cross-Examination, January 19, 2023 at p. 57, lines 11-14, Case Center Master p. A4384 [*emphasis added*].
[85] Exhibit 35, Collins Barrow Report at para. 36, Case Center Master F3581.
[86] Excludes transfers at $1 or $0. See Statement of Agreed Facts, Appendix "A", Case Center Master pp. F17-20.

i. Average transfer value (2 years preceding Uber's arrival): $189,704.

ii. Average transfer value (18 months preceding Uber's arrival): $189,511.

iii. Average transfer value (12 months preceding Uber's arrival): $176,167.

iv. Average transfer value (6 months preceding Uber's arrival): $170,682.

(b) Average plate transfer value during the Loss Period was $177,400; and

(c) No transfers of standard plates (at values other than $1 or $0) occurred between the end off the Loss Period on September 30, 2016 and June 5, 2017. It is only at this point (*i.e. 9 months after* the City's legalization of Uber through the coming into force of the 2016 By-law) that there is a measurable decline in average transfer values. [87]

90. This evidence suggests that the primary drivers of decline in the average plate transfer value were factors that do not give rise to any liability on the part of the City. Specifically, these drivers include:

(a) The taxi industry's knowledge of Uber as a known "threat"[88], given its aggressive spread throughout North America prior to Uber's arrival in Ottawa, and anticipation that Uber would enter the Ottawa market; and

(b) The coming into force of the 2016 By-law. The 2016 By-law has been confirmed as legal from both a municipal powers and *Charter* perspective.[89]

91. The evidentiary record supports the notion that these factors drove the decline in plate value. In terms of declining plate value prior to Uber's arrival in Ottawa, the Collins Barrow Report noted the following as early as April 14, 2015 (*i.e.* the middle of the Loss Period):

[87] Statement of Agreed Facts, Appendix "A", Case Center Master pp. F17-0.
[88] Liability Decision, 2024 ONSC 2725 at para. 209.
[89] *Unifor, Local 1688 v. The City of Ottawa,* 2018 ONSC 3377.

> 24…We have not been able to obtain information on plate values between 2012 and the valuation date. As explained below, the lack of plate sale information since 2012 is due to uncertainty in the market place caused by emerging technologies which is forcing changes to the regulatory framework for taxicabs in North America. Per management, the uncertainty has reduced the number of plates traded since 2012.
>
> 25. We understand from management that, at the valuation date [*i.e. February 22, 2014*], the taxi industry in North America was being impacted by emerging technologies. Historically, cities would regulate and limit the number of taxi plates operating in a jurisdiction. This allowed the cities to dictate safety, training and insurance requirements on the taxis operating in their jurisdictions. Limits on the number of plates in circulation, at any given point in time, has resulted in a high valuation on plates for purchasers who want to acquire a plate.
>
> 26. In the years leading up to the valuation date [*i.e. February 22, 2014*] the industry had been impacted by new technologies such as:
>
> > Smart phone and electronic applications ("apps") which are forcing existing taxi companies to change the way they book and dispatch their cabs; and
> >
> > New competition such as the emergence of Uber in North America.
>
> New technologies are enabling companies to sidestep the historical regulatory framework. This is opening up the taxi industry to new competition and changing the regulatory environment for the industry. Essentially, since the need to own a taxi license plate in order to provide passenger transportation services is decreasing, the value of the taxi plates are decreasing as well.
>
> 27. At the valuation date, Uber had not launched in Ottawa but had launched in other cities in North America including Toronto. Research existing at the valuation date had indicated that, since the Uber service (and other technologies) had launched in other jurisdictions, the value of taxi license plates have decreased significantly.
>
> 28. The most significant impact to the market for taxi plates in Ontario has been the changes in Toronto…[90] [*emphasis added*]

92. This accords with Mr. Way's evidence that he "was concerned about Uber as early as 2010".[91]

93. In terms of declining plate value after Uber's arrival, if the City's failure to enforce against Uber was the primary driver of that decline, then plate transfer values should have fallen immediately after Uber began operating in Ottawa. The fact that they did not meaningfully diminish until nine (9) months after the end of the Loss Period strongly suggests that any decline was driven by Uber's legalization and not by any negligence of the City.

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[90] Exhibit 35, Collins Barrow Report, paras. 24-28, Case Center Master pp. F3577-78.
[91] Liability Decision, 2024 ONSC 2725 at para. 198.

94. In short, awarding damages in the aggregate based on the decline in fair market value of plate licenses will overstate the City's damages by attributing to the City losses which were caused by events beyond its control and actions that do not give rise to liability in tort.

III. Damages are more accurately measured based on a loss of income from the taxi plate during the Loss Period

95. Considering the evidence outlined above, the City submits that determining damages based on an income loss model is a more accurate and appropriate method of determining the Plaintiffs' actual losses during the two-year Loss Period.

96. At paragraph 44 of their written submissions, the Plaintiffs state that "[t]he City's negligence was the same for all plate owners".[92] However, this statement erroneously assumes that the same negligent *act* impacted all members of the Plate Holder Class in the same way. If this were true, all cases that are certified as a class would result in aggregate damages being awarded, and there would not be any need for the *Ramdath* factors.

97. Instead of relying on the assumption that the same negligent act impacted all plate holders in the same way, an income loss model would better account for the idiosyncrasies of the Plaintiffs' business models and would more accurately distinguish between those Plaintiffs that suffered losses during the Loss Period and those that did not. In other words, it would directly account for the reduction in plate value *caused by the City's negligence*.

98. Loss of income could be easily and efficiently determined by measuring the average income earned by the Plaintiffs from the taxi plate before the Loss Period and comparing it to the average income earned during the Loss Period (factoring in any mitigation efforts on the part of the individual plate holder). This approach is discussed in greater detail below.

[92] Plaintiffs' Written Submissions at para. 24, Case Center Master p. A7746.

IV. The idiosyncrasies of different business models

99. The evidence demonstrates a wide variance in business models pursued by different groups of Plaintiffs. For example, Justice M. Smith recognized three distinct categories of plate holders, each of which pursue distinct business models:

> Taxi plate holders can be broken down into three categories:
>
> i. Single plate license holder-drivers - these are individuals who hold a taxi plate holder license and drive the taxicab to which they affix the taxi plate the City issued to them in connection with the taxi plate holder license. They may also rent the taxi plate to second or third drivers for the time period when the taxi plate license holder is not driving the taxi themselves.
>
> ii. Multi-plate license holders - these are individuals who hold multiple taxi plate holder licenses. They may drive taxicabs to which a plate is affixed or may not drive taxis themselves. They may lease or rent their taxi plate holder license and its connected taxi plate out to taxicab drivers.
>
> iii. Retired (absentee) plate license holders - these are individuals who hold one or more taxi plate holder licenses and are retired from driving. These individuals may rent their taxi plate licenses out to taxicab drivers.[93]

100. Put differently, the different streams of expenses and income for each category of plate holder can be summarized as follows:

Table 5: Comparison of expenses and income by plate holder category

Category of plate holder	Operate taxi?	Expenses	Income
Single plate holder-driver	Yes	- Stand rent - Maintenance - Insurance - Fuel - Union dues	- All monies collected after fixed expenses[94] - Potential to rent to secondary driver – that rental amount not fixed by collective bargaining agreement ("**CBA**")[95]

[93] Liability Decision, 2024 ONSC 2725 at para. 30.
[94] Marc André Way, Cross-Examination, January 12, 2023 at p. 25, lines 1 – 7, Case Center Master p. A3794.
[95] Exhibit 56, Policy Options Paper, November 18, 2015, Case Center Master pp. F3162-63 ["Exhibit 56, Policy Options Paper"].

Absentee plate holder	No	N/A	- Plate rent from lease of plate (amount not fixed by CBA)[96]
Multi-plate holder	Typically, no	N/A	- Plate rent (amount fixed by CBA) - Daily rental (amount fixed by CBA)[97]

101. As of March 2016, the allocation of plate holders between these three categories was as follows:

(a) 644 single plate holders ("**SPH**")-drivers, each of whom held one plate license, total approximately 55% of the 1,188 total plates in circulation;[98]

(b) It is unknown how many absentee plate holders exist in comparison to the number of SPH-drivers, though it was Mr. Way's evidence that "most" SPHs operate their own plates.[99]

(c) 111 multi-plate holders, collectively holding 544 plates, or approximately 45% of the plates in circulation.[100]

102. There is variance in risk tolerance and business approach within these individual categories. For example, both Mr. Dadi and Mr. Mail are SPH-drivers who articulated different approaches to their business decisions. Mr. Dadi testified that he never intended to sell his plate and instead sought to rely on it as a guaranteed source of income in retirement.[101] In contrast, Mr. Mail made the business decision to sell his plate.[102]

[96] Exhibit 56, Policy Options Paper, Case Center Master, pp. F3162-63.
[97] Marc André Way, Cross-Examination, January 12, 2023 at p. 26, lines 19-25, Case Center Master p. A3795.
[98] Exhibit 42, Document 8 – Summary of Plate Ownership, Case Center Master p. F2978.
[99] Marc André Way, Cross-Examination, January 12, 2023 at p. 3, lines 9 -11, Case Center Master p. A3772.
[100] Exhibit 42, Document 8 – Summary of Plate Ownership, Case Center Master p. F2978.
[101] Yeshitla Dadi, Cross-Examination, January 23, 2023 at p. 122, lines 7-12, Case Center Master p. A4696.
[102] Iskhak Mail, Examination in Chief, January 18, 2023 at p. 134, line 13 – p. 124, line 11, Case Center Master p. A4308-9.

103. Similarly, different SPH-drivers articulated different motivations for entering the taxi business. Mr. Mezher testified that he wanted a career with a more flexible schedule so he could spend more time with his family.[103] In contrast, Mr. El-Feghaly focused on the potential merits of a taxi plate as an investment vehicle.[104]

104. While two plate holders may hold an identical asset, one may use their asset to actively earn income by operating a taxi, and the other may use their asset to earn passive income by renting it out.

105. Considering the differences of individual business models, a top-down approach to damages, particularly one based on loss of fair market value of plate licenses, is inappropriate as the evidence shows a wide variance between plate holder groups and does not consider other factors, such as Uber's intention to enter the market and its ultimate legalization.[105]

V. Multi-plate holders did not lose any income during the Loss Period

106. The evidence shows that multi-plate holders did not in fact lose any income during the Loss Period.

107. The revenue of multi-plate holders is driven by how many plates they can lease or rent. Therefore, it is immaterial to the multi-plate holder how much the lessee or renter in fact earns.[106]

108. Lease rates are in turn fixed, typically in three-year increments through collective bargaining agreements, meaning that there is a lag in the realization of damages by multi-plate holders.[107] This lag

[103] Ziad Mezher, Examination in Chief, January 17, 2023 at p.126, line 31 to p. 127, line 6, Case Center Master pp. A4177-78.
[104] Antoine El-Feghaly, Examination in Chief, January 25, 2023 at p. 89, lines 4-22, Case Center Master p. A4967.
[105] *Spina* (ONCA), 2024 ONCA 642 at para. 210.
[106] Marc André Way, Cross-Examination, January 12, 2023 at p. 26, lines 19-25, Case Center Master p. A3795.
[107] See Exhibit 1, JBD, Part A, Tab 3, West-Way, October 10, 2012 to October 9, 2015, Case Center Master pp. F4937-93; Exhibit 1, JBD, Part A, Tab 5, Airport, July 15, 2014 to August 1, 2015, Case Center Master pp. F5041-85; Exhibit 1, JBD, Part A, Tab 7, Blue Line, August 14, 2015 to August 13, 2016, Case Center Master pp. F5171-251; Exhibit 1, JBD, Part A, Tab 8, Capital Taxi, December 21, 2010 to October 31, 2014, Case Center Master pp. F5253-96; Exhibit 1, JBD, Part A, Tab 9, Capital Taxi, January 14, 2016 to January 13, 2019,

is evident from Metro's financial statements from 2011 to 2018 (all of which were tendered at trial for the truth of their contents), which showed only a minimal loss in revenue during the Loss Period:[108]

Year End	Reference	Revenue	Change in Revenue from Year Prior	
			$	%
2012	F7554	$ 1,055,140	$ 23,067	2.24%
2013	F7560	$ 1,080,120	$ 24,980	2.37%
2014	F7566	$ 1,106,090	$ 25,970	2.40%
2015	F7572	$ 1,111,903	$ 5,813	0.53%
2016	F7578	$ 1,081,058	$ (30,845)	(2.77%)
2017	F7584	$ 1,039,496	$ (41,562)	(3.84%)
2018	F7590	$ 1,003,240	$ (36,256)	(3.49%)

109. Mr. Way agreed on cross examination that the information contained in the financial statements was based on information provided by him or his staff, and that he reviewed them to ensure he was satisfied with them.[109]

110. This evidence also reflects the findings of the Hara Associates Report, titled "Taxi Economics – Old and New" (the "**Hara Report**"), which states that, in the short run, drivers bear almost the entire burden of gross revenue decline because of new entrants in the market. By contrast, the Hara Report states that plate holders and taxi dispatch companies are insulated from the short run impacts.[110]

111. In other words, within the Loss Period, loss of income from the taxi plate would have been experienced by the SPHs, but not by the multi-plate holders. Therefore, awarding damages in the aggregate to all Plaintiffs (particularly based on mass reduction of plate values) would not only overstate damages generally, but it would also overcompensate multi-plate holders, because multi-plate holders'

Case Center Master pp. F5298-350; Exhibit 1, JBD, Part A, Tab 40, Ziptrack, 2011-2014, Case Center Master pp. F6576-601; Exhibit 1, JBD, Part A, Tab 41, Ziptrack, 2013-2016, Case Center Master pp. F6603-30.

[108] Exhibit 1, JBD, Part A, Tab 63, Case Center Master pp. F7544-91.

[109] See Marc André Way, Cross-Examination, January 11, 2023, p. 18, line 16 – p. 19, line 6, Case Center Master pp. A3627-28; Marc André Way, Cross-Examination, January 11, 2023, p. 19, line 20 – p. 22, line 4, Case Center Master, pp. A3628-31.

[110] Exhibit 55, Taxi Economics – Old and New, Case Center Master p. F3095.

losses would be nominal in the Loss Period. Multi-plate holders should not receive a windfall because of the way damages are assessed.

VI. Conclusion – Second Ramdath Factor

112. The Plaintiffs' approach of calculating damages based on plate value fails to account for the fact that plate licenses could not all have been liquidated simultaneously. It also fails to account for the fact that no actual loss in standard plate value occurred during the Loss Period. Therefore, the Plaintiffs' suggestion of calculating the loss based on plate value overstates the damages and as a result cannot satisfy the second *Ramdath* factor.

113. To the extent that the Plaintiffs have suffered losses, the evidence supports that a loss of income analysis (which is an inherently individualized approach) is a more reasonable measure of the losses caused by the City's negligence. It ensures that damages for multi-plate holders are not overstated.

C) Factor 3: Access to Justice

114. The Plaintiffs submit that an individualized approach to awarding damages would result in 768 cumbersome individual trials.[111] Therefore, they advocate for aggregate damages to be awarded to ensure access to justice for the Plaintiffs. However, in so doing, the Plaintiffs paint a false and misleading dichotomy between the two approaches.

115. Where a methodology to calculate aggregate damages is inadequate because the assessment of damages in a particular class action is "inherently idiosyncratic",[112] section 25 of the CPA grants the Court broad discretion to craft an appropriate method for adjudicating individual claims:[113]

[111] Plaintiffs' Written Submissions at para. 51, Case Center Master p. A7754.
[112] *Spina* (ONCA), 2024 ONCA 642 at para. 210.
[113] *Spina* (ONCA), 2024 ONCA 642 at para. 227.

Individual issues

25 (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.[114]

116. Section 25(3) of the CPA goes on to specifically empower the Court to create individualized processes with the view of preserving the right to access to justice for the parties:

25 (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.[115]

117. Section 25 may be used where the test in section 24(1) is not met. In considering the two sections, the Ontario Court of Appeal likened the section 24(1) approach to a "top-down" approach—one where global damages can be assessed, and the section 25 approach to a "bottom-up" approach—which requires proof of individual claims from individual members.[116] In this sense, they are two sides

[114] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 25 ["CPA"].
[115] CPA, S.O. 1992, c. 6, s. 25(3).
[116] *Fulawka*, 2012 ONCA 443 at para. 126.

of the same coin. Therefore, while aggregate damages may be more the norm than the exception,[117] section 25 ensures that access to justice is safeguarded by allowing the Court to develop procedures to provide an "effective remedy" where the award of aggregate damages is not appropriate.[118]

118. For these reasons, the Courts have stressed that it is a fallacy to assert that individual assessments (rather than aggregate damages) deny access to justice to the Plaintiffs. For example:

(a) The Supreme Court of Canada, citing the summary judgment principles outlined by the Supreme Court of Canada in *Hryniak v Mauldin*[119], emphasizes that section 25(3) grants the court licence to employ "[c]reativity and the principles of proportionality" when designing the individual issues stage of a class action;[120]

(b) Similarly, the Ontario Court of Appeal has held that section 25 grants judges "wide latitude to simplify and expedite the individual issues trials such that access to justice issues can be addressed;"[121]

(c) Finally, the Court of Appeal has expressly held that individual assessments under section 25 do not necessarily require individual trials to take place "if a more procedurally efficient process can be designed under an individual issues protocol."[122] Rather, while the protocol must include "procedural and evidentiary terms", "there is considerable flexibility available to craft a fair and efficient process" under section 25.[123]

[117] *Ramdath* (Ont Sup Ct), 2014 ONSC 3066 at para 1.
[118] *Fulawka*, 2012 ONCA 443 at para. 143.
[119] *Hryniak v Mauldin*, 2014 SCC 7.
[120] *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879 at para. 47 ["*Lundy*"].
[121] *Spina* (ONCA), 2024 ONCA 642 at para. 194.
[122] *Spina* (ONCA), 2024 ONCA 642 at para. 226.
[123] *Spina* (ONCA), 2024 ONCA 642 at para. 231.

119. In other words, there is no one-size-fits-all approach to designing an individual issues protocol for awarding individualized damages. That stated, some discernible features can be extracted from the case law. For example:

(a) Division of claimants. These protocols typically divide the class members based on the amount claimed or the perceived severity of harm alleged. This then allows for each track of claim to be assigned a procedure that corresponds in severity. The higher the claimed damage, the process will correspondingly be more adjudicative in nature.[124]

(b) Bellwether cases. A selection of sample claimants whose individual assessments will act as a bellwether for the remaining claimants. There can be bellwether cases under each track, for example. Those cases then act as precedent to guide and expedite the remaining claims.[125]

(c) Class counsels' fees. Class counsel typically remains counsel for the individual claimants unless the claimants choose otherwise.[126] The fees charged by class counsel similarly corresponds to the division of claimants. Where the claimants fall under the least severe track, no additional fees can be charged. Where the claimants fall under the most severe track, counsel may charge for their full fees.

(d) Administrator. The appointment of an administrator to oversee and administer the protocol. This typically involves managing each claimant's file, acting as gatekeeper for the claims, and working cooperatively with the parties.[127]

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[124] See *e.g. Brazeau v. Canada (Attorney General)*, 2020 ONSC 7229 [*Brazeau*]; *Cavanaugh v. Grenville Christian College*, 2022 ONSC 5405.
[125] See *e.g. Brazeau*, 2020 ONSC 7229.
[126] See Plaintiffs' Written Submissions at paras. 52, 53, 57 and 58, Case Center Master pp. A7754-7756. This addresses the Plaintiffs' concern that certain Plaintiffs will not have the benefit of experienced counsel if aggregate damages are found to be inappropriate.
[127] See *e.g. Francis v. Ontario*, 2023 ONSC 5355 ["*Francis*"].

(e) Document management. Protocols may prescribe a means of managing documents, both in terms of how evidence is submitted and how that documentary evidence is stored and accessed.[128]

(f) Referee. A referee or a roster of referees may be appointed to adjudicate the claims. These referees may be retired judges or senior members of the bar. Their decisions remain under the supervision of the Court.[129]

(g) Emphasis on settlement. Most protocols provide space for settlement discussions. Some incorporate those discussions into the protocols themselves.

120. Ultimately, the Plaintiffs bear the burden of presenting this Court with a viable methodology for awarding damages in this case. However, the Plaintiffs' failure to articulate a methodology does not mean that an individualized approach to awarding damages (that also promotes and protects access to justice) is not available/possible.

121. Indeed, if this Court decides to award damages to the plaintiff Plate Holder Class through an individualized approach, a simple method of assessing the Plaintiffs' income loss from the taxi plate before and during the approximate two-year Loss Period is by reviewing the Plaintiffs' tax returns and/or financial statements. These documents can be reviewed through a largely administrative process (*e.g.* through affidavit evidence), with the City being afforded the opportunity in defined circumstances to cross-examine or audit the records (where necessary).

122. This individualized approach manages to appropriately balance access to justice considerations with the fairness concerns raised by the *Ramdath* factors. Therefore, the Plaintiffs' argument that individualized damages hinders access to justice in the instant case is simply not tenable.

[128] See *e.g. Lundy*, 2015 ONSC 1879.
[129] See *e.g. Francis*, 2023 ONSC 5355.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of March, 2025.

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SCHEDULE "A" – LIST OF AUTHORITIES

1. *Metro Taxi Ltd. et. al. v. City of Ottawa*, 2024 ONSC 2725;
2. *Metro Taxi Ltd. v. City of Ottawa*, 2018 ONSC 509;
3. *Spina v. Shoppers Drug Mart Inc.*, 2023 ONSC 1086;
4. *Spina v. Shoppers Drug Mart Inc.* 2024 ONCA 642;
5. *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443;
6. *Ramdath v. George Brown College,* 2014 ONSC 3066;
7. *Ramdath v. George Brown College,* 2015 ONCA 921;
8. *Bernstein v. Peoples' Trust Company*, 2019 ONSC 2867;
9. *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288;
10. *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115;
11. *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57;
12. *R. v. Mohan*, [1994] 2 SCR 9;
13. *Krawchuck v. Scherbak,* 2011 ONCA 352;
14. *Metellus v. Procureur général du Québec*, 2024 QCCS 2388;
15. *Healey v. Lakeridge Health Corp*., 2010 ONSC 725;
16. *Healey v. Lakeridge Health Corp.,* 2011 ONCA 55;
17. *Unifor, Local 1688 v. The City of Ottawa,* 2018 ONSC 3377;
18. *Hryniak v Mauldin*, 2014 SCC 7;
19. *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879;
20. *Brazeau v. Canada (Attorney General)*, 2020 ONSC 7229;
21. *Cavanaugh v. Grenville Christian College*, 2022 ONSC 5405;
22. *Francis v. Ontario*, 2023 ONSC 5355.