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Disrupting the Taxi Industry On a Class Wide Basis: The Certification Decision in *Metro Taxi v City of Ottawa* Raises Questions for Municipalities

Since the introduction of ride sharing technology such as Uber, a legal dust-up with traditional taxi drivers and brokers seemed inevitable. Perhaps less predictable was the form that dispute would take. In *Metro Taxi Ltd. v. City of Ottawa*, the Court considered a certification motion for a class action brought by taxi license plate holders and brokers against the City of Ottawa for their regulatory handling of the introduction of Uber, claiming both negligence and discrimination.

In September of 2014, Uber began operating in Ottawa without obtaining licenses or taxi plates as required by the City's by-law regulating taxis. The City launched a review of their by-laws in the wake of Uber's arrival. In September of 2016 new by-laws came into effect which created a new class of licences for private transportation companies while maintaining the licensing regime for traditional taxis.

The plate holders and brokers launched a class action against the City claiming negligence in the enforcement of the taxi by-law. The class also sought to certify a claim for discrimination under the *Charter of Rights and Freedom* and the *Human Rights Code* on the basis that a large percentage of the proposed class members were members of minority groups.

Justice Smith certified the class action, finding that all of the required criteria set out in Section 5(1) of the *Class Proceedings Act* were met.

A Validly Pleaded Cause of Action

In considering the first factor, whether the pleadings disclosed a cause of action, the City agreed that negligence was validly pleaded but argued it was plain and obvious the claim could not succeed. The City pointed to statements of a proposed representative plaintiff which linked the damages suffered and the actions of Uber, not the actions of the City. In dismissing this argument, Justice Smith likened the proposed class action to other claims where an institutional actor shared liability with

others more directly involved in the harm.

On the claim of discrimination pursuant to the *Charter* and the *Code*, Justice Smith found that it was not plain and obvious that such a claim would not be successful. Justice Smith noted that a by-law could be neutral on its face while giving rise to differential treatment and an adverse discriminatory effect.

The Identifiable Class

Justice Smith certified two classes: plate holders operating between September 1, 2014 and September 30, 2016 and brokers operating during the same time frame. The timeframe encapsulates the arrival of Uber and the changes to the by-laws.

The City argued that the class of plate holders was overbroad as the claim for discrimination did not apply to 6-7% of plate holders within the class who were not members of a minority. Justice Smith rejected this argument, holding that the inclusion of a small percentage of individuals who ultimately may not have a claim in one of the common issues was not sufficient to make the class overbroad.

Common Issues

The plaintiffs originally proposed 18 common issues, which had been reduced to five by the certification motion. The common issues related to the enforcement of the taxi by-law, the lawfulness of the 2016 amended by-law and whether the fees collected under the taxi by-law were an unlawful tax were certified as valid common issues without dispute.

The common issues related to discrimination and aggregate damages were considered in greater detail by Justice Smith to determine if some basis in fact had been provided by the proposed class.

In considering the claim for discrimination as a common issue, Justice Smith found that it would not apply to the 6-7% of class members who were not members of a minority group. Justice Smith declined to create a subclass, instead finding that where class members share identical common ingredients in four of five common issues, a small number could be tolerated as not having a claim in the remaining issue.

On the availability of aggregate damages, the proposed class argued that aggregate damages for the loss of value in their taxi plates should be certified. Questions arose on the motion regarding the varied prices paid as well as the secondary market in plates. The plaintiff class did not provide evidence of an expert methodology for calculating the decline in value. However, Justice Smith approved the common issue, finding

that if aggregate damages were not found to be appropriate, damages could then be determined individually.

Preferable Procedure and Appropriate Representative Plaintiff

The City did not contest that a class action would be a preferable procedure and the proposed representative plaintiffs for each of the two classes were found to be appropriate.

The Fallout

In the wake of this certification decision, municipalities who regulate disruptive technology companies entering their jurisdiction are left with a number of questions.

In most Canadian municipalities, companies like Uber enter the market before regulators have crafted their regulatory regimes to account for the changing landscape. Municipalities often take a reactive approach, as Ottawa did, adapting regulations in the aftermath of the introduction of these services in their jurisdiction. Now municipalities face a legal risk from traditional businesses in the marketplace that are the target of these new companies. Where a municipality regulates in the aftermath and not prospectively, there is a risk of creating a class with a claim in the interim.

Municipalities may also face difficulties in creating regulatory distinctions between traditional and new technology companies, where those distinctions arguably create an imbalance. It is yet to be seen how the discrimination claim will be adjudicated on the merits, but the fact of certification should raise questions around every municipal council table considering parallel regulatory regimes for disruptive technology companies in traditionally regulated industries.