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COURT REFUSES TO ENJOIN USE OF CONTROVERSIAL RIDE SERVICE: UBER DRIVES ON IN TORONTO

By Stephen Thiele, Fatema Jivaji and Pinchas Huberman

The use of a ride-share service application created by a company called Uber has caused much controversy worldwide.

For example in Paris, taxicab drivers protested its use and eventually caused UberPOP to halt activities in France. In some other jurisdictions, applicable legislation or proposed amendments to existing legislation has either prevented the use of the application or caused Uber to voluntarily shutdown the service.

Meanwhile in Toronto, City Councillor Jim Karygiannis has recently taken a very prominent political role in trying to stop Uber from operating therein, while Toronto City staff has increased the number of tickets it has issued for bylaw infractions.

Opposition to Uber

Although the ride-share service is popular among users, Toronto's taxi cab industry, which is strictly regulated by government, is vehemently opposed to Uber for many reasons.

According to media reports and material filed in *Toronto (City) v. Uber Canada Inc.*¹, it is estimated that since Uber (Canada) began operating three years ago in Toronto there are now almost as many Uber drivers in this city as there are taxicab drivers. Meanwhile across Ontario Uber expects to have 15,000 drivers signed up under Uber X by the end of 2015.

The rapid growth and popularity of Uber has arguably devalued expensive taxicab licences as well.

One of the reasons for this is that the ride-share service application, which is essentially described as a super-charged directory assistance service that connects service providers (drivers) with service users (passengers), permits drivers to collect a fee using their own car instead of being required to rent a taxi from a licenced holder.

How Uber Works

Within this business model, Uber's role in connecting drivers and passengers is passive. It merely acts as a technical liaison.

Passengers and drivers use respective "Rider" and "Driver" apps, which can be downloaded anywhere in the world, to send and receive requests for a ride. When a passenger sends a request, servers in Northern California, using software systems that generate data about traffic and customer demand, direct the request to the nearest available driver through the Driver App for acceptance.

Toronto's Action to Stop Uber

Based on the manner in which Uber operates, and current municipal bylaws governing both the taxicab and limousine industries, the City of Toronto brought an application against Uber to, in a nutshell, shut it down.

But in *Toronto (City) v. Uber Canada Inc.*, a court refused to grant the City's request for a permanent injunction against Uber.

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1. 2015 ONSC 3572, Notice of Appeal filed.



City's Argument

Broadly speaking, the City argued that Uber's operation is contrary to chapter 545 of the *Municipal Code*. Under this chapter the following definitions of "taxicab", "limousine", "taxicab broker" and "limousine service company" are found:

"TAXICAB" – An ambassador taxicab, a standard taxicab, a Toronto taxicab and an accessible taxicab.

"LIMOUSINE" – Any automobile other than a taxicab as defined by this chapter used for hire for the conveyance of passengers in the City of Toronto, and formerly referred to in this chapter as a "livery cab".

"TAXICAB BROKER" – Any person who accepts requests in any manner for taxicabs used for hire and which are owned by persons other than himself or herself, his or her immediate family or his or her employer.

"LIMOUSINE SERVICE COMPANY" – Any person or entity which accepts calls in any manner for booking, arranging or providing limousine transportation.

The City submitted that unlicensed automobiles carrying passengers for hire in Toronto (i.e. Uber automobiles) were a "taxicab" under the Code and that Uber was a "taxicab broker".²

The City also contended that the word "accept", as found in both the definition of "taxicab broker" and "limousine service company", should be interpreted as synonymous with the words "receive" or "relays". In this way, the word "accepts" was, according to the City, broad enough to

include Uber's ride-sharing service.³

Thus even if Uber was not a "taxicab broker", the City argued that it was a "limousine service company".

Justice Dunphy disagreed with all of the City's arguments.

Uber Not a Taxicab Broker

On the key points advanced by the City, Justice Dunphy reasoned that if a broad definition of "taxicab" was accepted, it would make nonsense of the definition of "limousine".⁴

Accordingly, His Honour concluded that "taxicab" as used in the Code was a limited term applying only to holders of any of the four categories of licence holders referenced therein, while "limousine" included all other automobiles other than taxicabs used for hire in the specific manner described.

Since none of the users of the Driver App operated vehicles that could be described as "taxicabs" for the purposes of the definition of "taxicab broker", Uber could not be such a broker for those users.⁵

Uber Not a Limousine Service Company

Justice Dunphy also concluded that Uber was not a "limousine service company" because Uber did not "accept" "calls" and there was no evidence that even if "relaying" requests were subsumed by the City's definition of the business, Uber was responsible for such relaying.⁶

In considering the meaning of the word "accept", Justice Dunphy specifically stated that as a matter of statutory interpretation, words in an enactment are to be given their usual and ordinary meaning in the context in which they are used. In its usual and ordinary meaning, "accepts" entails some element of

2. Para. 60

3. Para. 65

4. Para. 57

5. While 500 Uber Taxi drivers and 50 Uber Access drivers use the Driver App, they use licensed Toronto taxicabs.

6. Para. 64



judgment, interaction or assessment.⁷

Uber's ride-share service did not operate in such a manner.

This was confirmed in Uber's terms of use for the Rider App which was consistent with evidence that Uber adopted a passive, purely mechanical role in enabling a driver and passenger to connect with one another and forming an agreement.

Justice Dunphy stated that "...the word 'accepts' as used in c. 545 of the Code required "the intervention of some element of human discretion or judgment in the process and that it could not be applied to a merely passive mechanical role of receiving and relaying messages. The fact that technology has evolved to the point where mechanical switches can be as 'smart' as human operators once were does not alter the meaning of the language employed."⁸

Given this conclusion, which equally applied to the definition of "taxicab broker", it was unnecessary for Justice Dunphy to consider other aspects of the definition of "limousine service company" for his ruling.

Nevertheless, Justice Dunphy proceeded to find that Uber was not a "limousine service company" because it did not accept "calls" from passengers.

In making this finding, the judge employed another general principle of statutory interpretation which stated that the presumption of consistent expression suggests that different words selected by legislators should ordinarily be given different meanings.

In the Code, the City used the word "request" under the definition of "taxicab broker", while it used the word "calls" under the definition of

"limousine service company".

Viewing the two definitions side-by-side, the judge interpreted "calls" as referencing phone calls or a medium of communication with an active participant on the receiving end. The automatic relaying of a passenger request did not constitute the acceptance of a "call".

Lastly, Justice Dunphy found as a fact that there was no evidence that Uber (or any of its companies) played any role in relaying messages sent from prospective passengers to a prospective driver so as to fall within the concept of "accepts calls in any manner for booking, arranging or providing limousine transportation".

The judge noted that the actual owner of the Uber Apps was not before the court and neither the owner nor operator of the servers in Northern California were identified.⁹

Expectations Going Forward

Notwithstanding the court ruling which has permitted Uber to drive on in Toronto (subject to any pending appellate court decision), Mayor John Tory has, among other public pronouncements on this issue, vowed to overhaul Toronto's entire taxi regime through the introduction of a new bylaw that will cover taxis, limousines and other ride-sharing services such as Uber.

While Mayor Tory hopes to present options for a new bylaw to City Council by this fall, the City of Waterloo has recently proposed a bylaw which would make it the first municipality in Ontario to regulate Uber.

According to media reports, the Waterloo bylaw would force ride-sharing drivers to apply for a region-issued taxi licence and to prove they have commercial auto insurance covering up to \$2 million in damages, a closed-circuit monitoring system that records

7. Para. 67
8. Para. 78
9. Para 103



the driver and passengers, and a GPS.¹⁰

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10. Tara Deschamps, "Waterloo bylaw would regulate Uber and others", Toronto Star, August 16, 2015

