

CITATION: City of Toronto v. Uber Canada Inc. et al., 2015 ONSC 3572
COURT FILE NO.: CV-14-516288
DATE: 20150703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

City of Toronto

Applicant

– and –

Uber Canada Inc., Uber B.V. and
Rasier Operations B.V.

Respondents

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)
) Michele Wright and Matthew Cornett, for
) the Applicant
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) John Keefe, Julie Rosenthal and
) Ryan Cookson, for the Respondents
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) **HEARD:** June 1 and 2 , 2015

REASONS FOR JUDGMENT

SEAN F. DUNPHY, J.

[1] This evening, a tourist from London visiting Toronto will take out her smartphone and press a button to activate an “app” that she downloaded months or even years ago. Her smartphone will display a map showing her location and a number of tiny black cars moving on the map near her. Each “car” on her map represents the location of a driver who is willing to carry her to her destination for hire. When she presses a button on screen, her phone will send a digital request to a server in Northern California and software on that server will automatically transfer the request to the smartphone of the driver of the car nearest her that she saw on the map. If the driver presses “accept” on his own smartphone, his phone will then send his own data through the same server back to her and they will meet and he will drive her to her destination. Other than the tourist and the driver, no human will participate in making that connection.

Software on her phone, on the driver's phone, at the server in Northern California and throughout the Internet will receive and pass along the data packets sent by each.

[2] Can it be said that each of the company who licensed the software to her in London a year ago, the company that licensed the software used by the driver she summoned, the Canadian company who marketed the software to those drivers in Canada; or the owner of the software running 24:7 on that server in Northern California “accepts” a call or request for service in Toronto as the City of Toronto claims? Are any of them sufficiently similar to the traditional telephone operator/dispatcher of a taxicab broker to require a license in Toronto to continue to permit their software to operate automatically on that server in Northern California or on the phones of users worldwide who may happen to pass through Toronto?

Overview

[3] When the City of Toronto was incorporated 181 years ago, the Industrial Revolution was in its infancy. Local transport was by foot or by horse and communication with the central government required days at sea.

[4] The arrival of the private automobile early in the last century marked a disruptive change in the technology of the era. In a market characterized by vulnerable consumers and limited transparency, the City determined that the consumer interest in the taxi industry urgently needed protection. It reacted with regulations controlling prices, licensing drivers and placing strict limits on the numbers of licenses issued.

[5] The umbrella of regulation was soon extended to taxicab brokers who accepted calls from potential passengers and arranged to dispatch drivers to them due to their strategic placement as intermediary between drivers and passengers in many cases.

[6] In 2012, a new and potentially disruptive business model, pioneered by Uber, began operating in Toronto. It has been doing so in other municipalities in Canada and around the globe; operating in 260 cities and 45 countries from a common internet-based platform.

[7] In the short time it has operated in Toronto, Uber has increased both its scale and its service offerings. Uber exploits the speed of the internet and the ubiquity of GPS-enabled smart phones among large segments of the public to enable connections to be forged between drivers and passengers in new ways while offering broad ranges of choice both in terms of price and class of vehicle or service.

[8] Uber has developed a “peer-to-peer” service model that matches supply with demand and incents drivers to provide coverage where none might otherwise be available. In a few short years, Uber has grown tremendously. Tourists and residents alike use it and are able to select the type of car and service they wish. It has almost as many drivers in Toronto as there are licensed taxicab drivers in Toronto. The entire licensing regime of the taxicab and limousine industry is under growing pressure in the City as a result.

[9] The City finds itself caught between the Scylla of the existing regulatory system, with its numerous vested interests characterized by controlled supply and price, and the Charybdis of thousands of consumer/voters who do not wish to see the competition genie forced back into the bottle now that they have acquired a taste for it.

[10] The City seeks an injunction requiring Uber to apply for a license to operate either as a taxicab broker or limousine service company arguing that, in substance, they “accept” calls or requests for taxicabs or limousines.

[11] Uber’s strategy for exploiting an alleged “peer-to-peer” path exception to restrictive local regulations has been there for all to see for some time.

[12] Have the City’s regulations, crafted in a different era, with different technologies in mind created a flexible regulatory firewall around the taxi industry sufficient to resist the Uber challenge, or have they instead created the equivalent of a regulatory Maginot Line behind which it has retreated, neither confronting nor embracing the challenges of the new world of internet-enabled mobile communications?

[13] While both sides took great pains to couch their arguments in terms of the public interest, this court is not the proper forum for that debate. Questions of what policy choices the City should make or how the regulatory environment ought to respond to mobile communications technology changes are political ones. Such questions are, of course, the stuff of democracy. While democracy can be a messy business, our system wisely recognizes that the perfect must sometimes yield to the practical at the risk of a wrong turn or two along the way. Courts determine disputes in the light of the output of the political process and with all of the respect for the differing opinions of the actors that our constitutional order demands.

[14] For the reasons that follow, I have concluded that the City has failed to demonstrate a breach by the respondents of its by-law and the City's application should therefore be dismissed.

[15] The narrow definition the City has fashioned to describe these two regulated businesses is focused entirely upon the acceptance of a communication from a prospective passenger of taxicab or limousine services. None of the other aspects of the "Uber" business – marketing, recruiting drivers or even billing passengers and remitting fares to drivers – figure within the defined business of a taxicab broker or limousine service company upon which the City's entire application rests. The evidence has not demonstrated that any of the Uber respondents "accepts" communications from passengers from the point where a passenger determines to find a car and driver until the door closes behind him or her at the start of the intended trip. Software downloaded weeks, months or years in advance of the intended trip is simply activated by the passenger at the time and place of her choosing. There is no evidence before me as to the owner of the server in Northern California that relays messages between the rider and driver using their respective versions of the Uber App and the Uber entity that actually owns the software is not party to this proceeding at all. Accordingly, none of the respondents can fairly be described as carrying on either of the two businesses (taxicab broker or limousine service company) for which the City requires a license.

[16] My conclusion does not imply any judgment upon the merits of the existing regulatory regime the City administers, nor any conclusion as to what role the City may in future play in regulating new entrants such as Uber if it so chooses.

Factual Background

(i) City's Regulation of Taxi Industry

[17] A general overview of the nature of the City's regulation of the taxi industry and its objectives can be found in the Final Report of Toronto's Taxicab Industry Review (the "Final Report") that was tabled before City Council on January 8, 2014. That Final Report led to a number of significant reforms to the taxi licensing structure as well as the approval of technical updates to archaic language in some of the regulations. The Court had the benefit of extensive affidavit evidence of Ms. Tracey Cook, the Executive Director of the Municipal Licensing and Standards Division of the Toronto, concerning the City's policy objectives and the regulatory regime that provided helpful context.

[18] According to the Final Report, taxicabs play an important role in the transportation network of the City for residents and visitors alike. There are 4,849 licensed taxicabs (at the time of the Final Report) driven by approximately 10,000 drivers making an average of 65,000 trips per day generating something in the order of \$1.62 million per day in revenue. Counting drivers, owners, brokers, fleet garages and others involved in the industry, the Final Report estimated that there are 15,000 people employed in the industry.

[19] The authority of the City to regulate the taxicab industry arises from its authority to license businesses contained in the *City of Toronto Act, 2006*, S.O. 2006, c. 11. The *City of Toronto Act* expanded and clarified the scope of the jurisdiction of the City to pursue its purpose of providing good government with respect to matters within its jurisdiction through an accountable and democratically elected government (s. 2). Section 8(2)(11) confirmed the jurisdiction of the City to pass by-laws in relation to "business licensing". Section 86(1) of the Act confirms that the authority to provide for a system of licenses with respect to a business

includes the authority to “prohibit the carrying on or engaging in the business without a license” among other things. Section 94(1) of the *City of Toronto Act* specifically authorizes the City to establish fares and to limit the number of taxicabs or any class of them.

[20] Historically, “taxicabs” and “livery cabs” (later re-designated “limousines”) were licensed and regulated under the common moniker of “cabs”. While the number of taxicabs is subject to strict limitation, the number of limousines is (somewhat) less restricted. To prevent the relatively more lax constraints on the issuance of limousine licenses from undermining the strict limitations on the number of taxi licenses, the City has evolved a number of restrictions upon the limousine industry to ensure that its impact on the taxicab industry is muted. These include requirements that limousines operate on a pre-arranged basis with a minimum booking delay of 20 minutes, that a ratio of “stretch” to sedan limousines be maintained, that limousines charge a minimum fare of \$70 and that every owner of a limousine must have a service agreement with a licensed limousine service company.

[21] The foundation of the regulatory system is the requirement that “every owner and every driver of a taxicab” and “every owner and driver of a limousine” obtain a license in order to carry on business. Given the main thrust of the public interest in regulating the industry (consumer safety and protection), licensing the actual providers of the service to the public is the obvious cornerstone of the regulatory edifice. Virtually every public regulatory scheme of the private transportation business to which the court was directed is premised upon the licensing of owners and drivers of the vehicles providing the service.

[22] The logic of the next layer of regulation – that of brokers (or “limousine service companies”) – is straightforward. There are only 29 taxicab brokers but most of the 10,000 drivers have arrangements with one or the other of them to source at least a portion of their fares.

[23] Accordingly, c. 545 of the Code also requires every “taxicab broker” and every “limousine service company” to obtain a license even though neither of these provide the actual transportation service to the public.

[24] The definitions of these two businesses are critical in this case and are analyzed in further detail below. A “taxicab broker” is defined by Article I of c. 545 as “any person who accepts requests in any manner for taxicabs used for hire” while “limousine service company” is defined as “any person or entity which accepts calls in any manner for booking, arranging or providing limousine transportation”.

[25] A salient feature of the definitions of these two businesses is what they do not include. They do not describe the entire business of being a taxicab broker or limousine service company. They have picked but one precise aspect of the business upon which to base their definitions: the point where a prospective passenger places a call (limousine) or request (taxicab) to arrange for the hire of a taxicab or for booking of a limousine. The actual *arranging* of the transportation by taxicab or limousine, for example, is not part of the definition. Thus, while the City argues that Uber’s business has all of the attributes of a limousine service company or taxicab broker, none of those attributes save one - that of accepting calls or requests from prospective passengers – is relevant.

[26] This distinction is important since the City has argued quite strenuously that I should adopt a “holistic” view of the business of the respondents *collectively*. There is no concept of “enterprise licensing” in the Municipal Code. I cannot enjoin affiliates who are not themselves breaching the by-law, nor have I jurisdiction under s. 380 of the *City of Toronto Act* to issue injunctions barring affiliates from carrying on other aspects of their business for which no license is required. The only by-law breach alleged in this case is that of failing to obtain a license as a taxicab broker or limousine service company.

(ii) *Description of Uber’s Business*

[27] There are three respondents to the present application. While they are collectively described as “Uber” herein where it is not necessary to distinguish them (and they are generally so known by the public), there are important and doubtless deliberate distinctions between them in terms of role and function. While referring to them collectively for convenience, I consider

the role of each separately in answering the question of whether any of them are in contravention of the City's by-laws and thus exposed to an injunction under s. 380 of the *City of Toronto Act*.

[28] The three respondents are affiliates of each other and under common control. The precise corporate tree which links them was not explored by the City on cross-examination and I do not think is particularly material beyond establishing that they are affiliates of each other.

[29] Uber Canada Inc. markets the Uber brand to the public locally. It assists in recruiting drivers (who, when recruited, contract with other Uber entities). It has a limited role in pricing (specifically, the timing of removal of surge pricing). It handles service complaints when received and it has a general role in reviewing and analyzing service data and "heat maps" to assist in the fine-tuning of the system to meet local conditions. It can cause the accounts of riders and drivers under their respective App to be suspended or deactivated. Uber Canada has offices in Toronto but provides its supporting services across Canada.

[30] Uber Canada provides what might best be described as ancillary local¹ services within the overall "Uber" international business model. It does not own, operate or license to end-users the smartphone or internet application (the "App") used by passengers (the "Rider App") nor the App used by drivers (the "Driver App"). It does not contract directly with drivers or passengers nor collect the fares charged by the one and paid by the other. From the evidence before me, Uber Canada has no contact with the prospective passenger prior to or during any particular trip. It may become involved if the passenger has complaints to register after the fact.

[31] Uber B.V. is a Dutch company. Prospective passengers wishing to use Uber's services may download the Rider App freely on the internet. In order to use it, however, they must open an account and enter into an agreement with Uber B.V. authorizing them to use the Rider App around the world, including in Toronto. Whenever licensed users of the Rider App are in a

¹ By "local" in this instance, I mean "Canada" as Uber Canada provides supporting services for all of Uber's operations in Canada in the various markets which it now serves.

location to which drivers can be summoned using the Driver App, the authorized user can do so. Among the locations in the world where this is possible is Toronto.

[32] In addition to licensing the Rider App, Uber B.V. licenses the Driver App to drivers who apply for the Uber Black, Uber SUV, Uber Taxi and Uber Access services and has agreements with them.

[33] Rasier Operations BV (“Rasier”) is a Dutch company who licenses the Driver App to drivers who wish to provide services to riders using the Uber X and Uber XL services. Such drivers enter into separate agreements with Rasier.

[34] The Uber App itself is owned by yet another entity: Uber Technologies Inc. (“Uber Technologies”). Uber Technologies is not a party to this application. There has been no information placed before me identifying the owner or operator of the servers in Northern California which relays messages sent by the Rider App and the Driver App respectively, calculates fares, receives reviews and ratings, etc. There is certainly no evidence that any of the respondents own or operate the servers.

[35] The seven levels of service provided by driver-partners that Uber B.V. proposes to users of its Rider App are as follows:

- a. Uber X – ride service offered by drivers with standard 4 door sedans who are not otherwise holders of licenses by the City for taxi cabs or limousines. The pricing structure of Uber X is somewhat below the price for regulated taxicabs in the City.
- b. Uber XL – a ride service substantially similar to Uber X only offered in larger cars or vans and at a premium price to Uber X.
- c. Uber Select – a ride service substantially similar to Uber XL only offered in luxury cars of a higher quality than Uber XL and at a premium to the Uber XL price structure.

- d. Uber Black – a ride service offered by municipally licensed limousine drivers with municipally licensed limousines (e.g. Town Car and similar);
- e. Uber SUV – a ride service similar to Uber Black using licensed limousine drivers and cars, but offered in larger SUV-type limousines (e.g. Escalade and similar) at a premium price to Uber Black;
- f. Uber Taxi – a ride service provided by licensed City taxi drivers and cars at metered rates as set by the City; and
- g. Uber Access – similar to Uber Taxi only utilizing wheelchair accessible taxi cabs.

[36] To give an idea of scope, Uber indicated that it expected to have 15,000 drivers signed up under the Uber X Driver App in Ontario by year-end, the majority of whom are in the Toronto area (although Uber does not view the municipal boundaries of Toronto as being material to its business operations and drivers operate throughout the region). Only a comparatively small number of Uber drivers are licensed taxi drivers under the Uber Taxi or Uber Access banners – less than 600. By contrast, the City has licensed approximately 5,000 taxicabs with approximately 10,000 drivers and 880 limousines.

[37] In sheer numbers, it can be seen that Uber is well on the way to matching if not surpassing the number of licensed taxicab drivers and limousine drivers in Toronto. The comparison is not a perfect one, not only for the geographic region issue, but also because Uber drivers have complete control over the hours they choose to operate whereas economic imperatives are such that licensed City taxi cabs have little choice but to operate long hours, sometimes with multiple drivers. No statistics yet exist to compare the number of kilometers driven or trips taken.

[38] The difference between the various Uber service offerings described above hinges on price and quality of the automobile providing the service. Users can select between sedans, vans, luxury cars, limousines or SUV's with each selection coming at a different price point varying from below City "metered rates" to above. Those wishing to use traditional taxis can also use

the App to call licensed taxi drivers at the regulated rates. Drivers only turn over a portion of actual fares as opposed to renting their taxi or limousine from a license-holder at their own risk and at a fixed rate, allowing them to tailor their hours to their own requirements instead of to the necessity of paying rent on a license.

[39] A prospective passenger may download the Rider App over the Internet anywhere in the world and, once downloaded and licensed to the passenger and his or her device, the Rider App may be used indifferently in any location in the world where Uber drivers are available (260 urban areas, 45 countries as of the time of the application).

[40] Every user downloading the Rider App in Canada is required to agree to the User Terms as a condition of opening their account and obtaining a license to use the Rider App on his or her smartphone or other device. The Rider App contains the following terms, among others:

- “Uber offers information and a means to obtain transportation services offered by third party transportation service providers, drivers or vehicle operators (the “Transportation Provider”) which may be requested through the use of an application supplied by Uber and downloaded and installed by you on your single mobile device (smart phone) (the “Application”)”
- “The Application allows you to send a request for transportation service to a Transportation Provider....the Transportation Provider has sole and complete discretion to accept or reject each request for transportation service. “
- “Uber shall procure reasonable efforts to bring you into contact with a Transportation Provider in order to obtain transportation services, subject to the availability of Transportation Providers in or around your location at the moment of your request of transportation services”
- “For the avoidance of doubt: Uber itself does not provide transportation services, and Uber is not a transportation carrier....The provision of the transportation services by the Transportation Provider to you is therefore subject to the agreement (to be) entered into

between you and the Transportation Provider. **Uber shall never be a party to such agreement**” (emphasis added)

- “You acknowledge that Uber only acts as a passive conduit for the distribution of the User Content and is not responsible or liable to you or to any third party for the content or accuracy of the User Content. “
- “These User Terms are subject to the laws of the Netherlands”.

[41] Drivers wishing to gain access to Uber’s services must be screened and accepted as such by the relevant Uber entity depending on the level of service to be provided (Rasier licensing the Driver App to Uber X and Uber XL drivers, Uber B.V. to other drivers all of whom are municipally licensed) and enter into the appropriate licensing agreement with Uber B.V. or Rasier as the case may be.

[42] The Driver App as licensed by Uber B.V. is subject to “Partner Terms” which each registering driver is required to agree to in order to gain access to the Driver App. The Partner Terms include the following provisions:

“2. 1 Role of Uber

2.1.1 Partner acknowledges and agrees that Uber does not provide any transportation services, and that Uber is not a transportation or passenger carrier. Uber offers information and a tool to connect Customers seeking Driving Services to Drivers who can provide the Driving Service, and it does not and does not intend to provide transportation or act in any way as a transportation or passenger carrier.”

[43] Rasier licenses the Driver App to drivers providing Uber X and Uber XL levels of service. In order to obtain a license to operate the Driver App and offer those two levels of service, a prospective driver must enter into a “Transportation Provider Service Agreement” with Rasier. The Transportation Provider Service Agreement includes the following recitals and terms:

- “Rasier is engaged in the business of providing lead generation to the Transportation Provider comprised of requests for transportation service made by individuals using Uber B.V.’s mobile application (“Clients”). Through its license of the mobile application (“Software”), Rasier provides a platform for clients to connect with independent Transportation Providers.”
- “Rasier does not provide transportation services, and is not a transportation carrier. In fact, the Company neither owns, leases nor operates any vehicles. The Company’s business is solely limited to providing Transportation Providers with access, through its license with Uber, to the lead generation service provided by the Software, for which the Company charges a fee”.
- “Subject to the terms and conditions contained herein, this Agreement shall give you the right to accept requests to perform on-demand transportation services (“Requests”) received by you via the Software, for which you shall be paid a Service Fee (as described more fully below). Each Request that you accept shall constitute a separate contractual engagement”.
- “You shall be entitled to accept, reject and select among the Requests received via the Service. **You shall have no obligation to the Company to accept any Requests.** Following acceptance of a Request, however, you must perform the Request in accordance with the Client’s specifications.” (emphasis added)

[44] Uber has developed its own self-regulation regime that deliberately emulates but does not copy the safety regulations of the City. Among other features of Uber’s “self-regulation” model are:

- a. Drivers are subjected to license and criminal background checks with their licenses and photos retained on file²;
- b. Drivers may be reviewed by riders and, following a complaints process, may have their access to the Driver App suspended or cancelled;
- c. Vehicles are subject to annual inspection requirements and there are age and vehicle condition requirements;
- d. Snow tires are required between December and March each year;
- e. Uber keeps a record of *each trip taken* including time and date, starting point, end point, distance and route travelled, fare charged and the name of both passenger and driver; and
- f. Uber maintains an insurance policy of \$5,000,000 for passengers while on an Uber-arranged trip.

[45] Uber has also developed a number of innovations which it says enable it to match supply and demand very closely. With GPS and request data on its servers, Uber is able to generate “heat maps” in order to send out broadcast messages to drivers as to which areas are experiencing the highest demand so they can, if they wish, respond to that potential demand by positioning their vehicles or coming back into service. Where Uber’s algorithm detects imbalances in demand compared to supply, it can apply what is called “surge pricing” which is at a multiple (e.g. 1.5 x, 2.0 x, etc.) of the “standard” pricing level in that area and at that time. Prospective riders and drivers are both notified of this condition *before* any agreements to pick up a passenger are made. As drivers enter a service area and restore balance, surge pricing can be cancelled – either automatically or manually if Uber Canada so requests.

² Uber claims that at least 26 licensed Toronto taxi or limousine drivers have failed Uber’s driver review process and been denied access to the Driver App.

[46] The dual “acceptance” nature of the process (once by the driver and once by the passenger) is why it is characterized as “peer-to-peer” service since the technology platform enables the connection between the customer with the service provider, but allows the “peers” to make the final decision of whether to engage with each other or go their own separate ways.

[47] The outcomes of the Uber system are clearly not a perfect parallel to the various policy imperatives underlying the City’s regulations. Uber’s services cannot necessarily be accessed equally by all segments of the population. Those without credit cards, those without access to smartphones or mobile internet devices, for example, will not find it simple to use. Drivers or vehicles that have found disfavour with the travelling public (through negative reviews) may be declined fares even if otherwise meeting the minimum standards.

(iii) *The City’s Application*

[48] The City has brought this application seeking:

- a. A declaration that the respondents are operating a taxicab brokerage in the City contrary to c. 545 of the City of Toronto Municipal Code (the “Code”);
- b. A declaration that the respondents are operating a limousine service company in the City contrary to c. 545 of the Code;
- c. A permanent injunction restraining the respondents from:
 - i. Operating a taxicab brokerage and limousine service company in Toronto without a valid municipal license;
 - ii. Registering, contracting with or creating accounts for users to arrange or provide rides or communicate or exchange any information and facilitate rides from any location within Toronto, through its applications;
 - iii. Recruiting, contacting with or registering drivers to provide transportation originating from any location within Toronto; and

- iv. Advertising or promoting the availability of transportation either arranged or facilitated by Uber from any location within Toronto;
- d. A mandatory order requiring Uber to post a copy of any order on its web site; and
- e. A mandatory order requiring Uber to deliver an electronic copy of any order made to all users who have used the App to take trips in the Greater Toronto Area.

Issues

[49] The following issues are raised by this application:

- a. What is the proper construction of “Taxicab” and “Limousine” in Article I of c. 545 of the Code?
- b. Does Uber operate a “Limousine Service Company” as defined by c. 545 of the Code?
- c. Does Uber operate a “Taxicab Broker” as defined by c. 545 of the Code?
- d. If Uber is required to license any or all of their operations under c. 545 of the Code, does such requirement breach their protected right of freedom of expression contrary to s. 2(b) of the Charter of Rights and Freedoms (the “Charter”)?

Analysis and Discussion.

- (a) Definition of “Taxicab” and “Limousine”

[50] The City strenuously argued that unlicensed automobiles carrying passengers for hire in Toronto are nevertheless “taxicabs” as that term is defined in the Code with the result that a dispatcher or broker of such unlicensed automobiles can be described as a “taxicab broker” even if no trips with licensed taxis are being arranged. I do not agree.

[51] It is clear from a straightforward reading of c. 545 of the Code that only *licensed* taxicabs are included in the defined term “taxicab” while all other automobiles for hire to convey passengers are limousines such that the only relevant definition to consider for a business involved in arranging transport in such vehicles is that of “limousine service company”. The Code has provided its own mandatory definitions of “taxicab” and “limousine” leaving no room for conventional or dictionary interpretations to displace them.

[52] Chapter 545 of the Code provides in Article 1 thereof:

“For the purposes of this chapter, the following terms *shall* have the meanings indicated:

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 – An ambassador taxicab, a standard taxicab, a Toronto Taxicab and an accessible taxicab...” (emphasis added).

Each of “ambassador taxicab”, “standard taxicab”, “Toronto Taxicab” and “accessible taxicab” are defined terms in Article VIII of c. 545 of the Code and refer to particular categories of licenses issued to taxicabs in various time periods.

[53] The City urged me to adopt a broader definition of taxicab derived from the common law, found in such cases as *Gilbert v. Ottawa (City)*, [1975] O.J. No. 1272 (Div. Court and *R. v. Emslie* (1959), O.W.N. 279.

[54] The City also argued that since the definition of “owner” in Article VIII of Chapter 545 refers to taxicabs “licensed as such *or required to be licensed as such*” (emphasis added), c. 545 of the Code cannot be interpreted so restrictively as to confine “taxicab” solely to actual, licensed taxicabs. To similar effect, the City also points to the second sentence in the definition of taxicab in Article I of c. 545 which provides: “When used in reference to a taxicab, “owner” includes: (1) The owner of a cab licensed as such or required to be licensed as such under this

chapter...”. The City argued that both definitions of “owner” contemplate owners of both licensed and “required to be licensed” (i.e. unlicensed) taxicabs leading to the inference that the definition of taxicab must be construed broadly enough to bring unlicensed taxicabs within its reach.

[55] Despite the able argument advanced by the City’s counsel, I cannot agree with these submissions. The *Gilbert* and *Emslie* cases are of no assistance since there was no mandatory definition of “taxicab” in the statutes considered in those cases. Here, Article 1 of c. 545 of the Code provides that “the following terms *shall* have the meanings indicated”. The word “shall” in its plain and ordinary meaning is mandatory. There is no room to look for inspiration or guidance in other statutes or case law as to the meaning of a word when the legislator has *required* the use of a particular interpretation unless the definition itself introduces ambiguities that cannot be resolved without resorting to such aids.

[56] One need look no further than the definition of “building cleaner” in the licensing provisions of c. 545 of the Code for an example of the mischief that could be wrought were the mandatory definitions in Article 1 thereof supplemented with “common meanings” derived from other sources. If a dictionary or other common definition of “building cleaner” were to be employed, janitorial and similar indoor cleaning service businesses would be included in the sweep of the regulation and require a license. In fact, the defined term applies only to sandblasting and other similar cleaners of the *outside* of buildings.

[57] The City’s proposed expansive definition of “taxicab” were accepted, it would make nonsense of the definition of “limousine” in the same enactment. Almost every limousine would fit the generic common law taxicab definition (i.e. a vehicle carrying up to five or six passengers for hire) and thereby require a taxicab license in lieu of a limousine license. Reading the two definitions harmoniously, “limousine” would be the default category while “taxicab” would refer to licensed taxicabs only. In that case, the universe of automobiles for hire to carry passengers in the City is complete and includes both taxicabs (licensed) and limousines (whether licensed or

not) without overlap. That is the only interpretation which makes sense of both definitions and it is the one that I find is correct.

[58] The two definitions of limousine and taxicab work sensibly together only if the two definitions are applied in accordance with their ordinary meaning. Where one proposed definition leads to a coherent result and the other to an absurdity, the coherent result is to be preferred.

[59] I am not dissuaded from this view by the wording of the definition of “owner” in c. 545, Article VIII or in Article I both of which at least arguably suggest the possibility of unlicensed taxicabs. The legislative history of Article VIII, in particular, makes it clear that the reference therein to taxicabs (or “cabs” in Article I) is an historical vestige and cannot be said to overrule the mandatory language employed in the primary definitions of taxicab and limousine contained in Article 1 of c. 545 of the Code. Prior definitions going back at least as far as 1969 confirm this.

[60] Accordingly, I find that “taxicab” as used in the c. 545 of the Code is a limited term applying only to holders of any of the four categories of license referenced. Limousines include all other automobiles other than taxicabs used for hire in the manner described. There is no ambiguity or overlap.

[61] The corollary of this finding is that none of the users of the Driver App other than the roughly 500 Uber Taxi drivers and 50 Uber Access drivers are operating vehicles that may be described as “taxicabs” for the purpose of the definition of “taxicab broker” in the Code. All other such vehicles (i.e. unlicensed cars or licensed limousines) default to the category of limousine if they operated as part of a business and are used for hire for the conveyance of passengers in the City if they are caught at all. If the respondents are operating a business that requires a license, it can only be as a “limousine service company” in respect of all service offerings except Uber Taxi and Uber Access both of which utilize licensed Toronto taxicabs.

(b) Are any of the Respondents operating a Limousine Service Company?

[62] Article II of Chapter 545 of the Code provides:

“A. There shall be taken out by the following persons a license from the Municipal Licensing and Standards Division authorizing them respectively to carry on their several trades, business and occupations in the City of Toronto...and no person shall, within the City of Toronto, carry on or engage in any of the said trades, businesses or occupations until he or she has procured such license so to do:.....(44) every taxicab broker... (63) every limousine service company”.

[63] “Limousine service company” is defined as “any person or entity which accepts calls in any manner for booking, arranging or providing limousine transportation”. Since I have found that “limousine” includes both licensed limousines and other unlicensed vehicles for hire, the respondents’ business must fit within this definition if it is to be required to obtain a license for anything other than Uber Taxi or Uber Access.

[64] I have concluded that none of Uber’s business involves carrying on the functions which define a “limousine service company” under c. 545 of the Code. This is so for the three reasons: (i) the only point in the process where a request for transportation services is accepted is when a driver consciously determines to do so; (ii) no “calls” are involved in the process of a passenger using the Rider App; and (iii) even if “relaying” requests were subsumed by the City’s definition of the business, there is no evidence that any of the respondents are themselves responsible for such relaying.

i. Meaning of “accepts”

[65] The only limousine service company business which requires a license is one which “accepts” calls in any manner to arrange limousine transportation. The City contends that “accepts” in this context is a synonym for “receives” or “relays” and is broad enough to include a purely automatic software-driven relaying of digital data without human intervention. I cannot agree with that contention.

[66] The *Concise Oxford Dictionary* (8th ed., 1990) defines “accept” as follows:

“1 Consent to receive (a thing offered). 2 Give an affirmative answer to (an offer or proposal). 3 Regard favourably; treat as welcome (*her mother in law never accepted her*). 4 a believe, receive (an opinion, explanation, etc.) as adequate or valid b. be prepared to subscribe to (a belief, philosophy etc.). 5 receive as suitable to (a belief, philosophy etc.)...”

[67] It is to be noted that all of these definitions of “accept” involve an element of a recipient of the thing being accepted consciously assessing it in some fashion and none are consistent with a purely passive, mechanical relaying role. In its usual and ordinary meaning, “accepts” entails some element of judgment, interaction or assessment.

[68] Canada Post may accept instructions from a customer who has moved to forward their mail to another address. If one of its customers is a mail-order business selling widgets, it is not “accepting” orders for widgets merely by forwarding mail containing orders on the instructions of its customer.

[69] The goal of statutory interpretation is not to start with the desired outcome that the regulator seeks in light of new developments to see what means can be found to stretch the words used to accomplish the goal. I fear that adopting such a strained and artificial meaning of the word “accepts” as is contended for by the City accomplishes just that. Words in an enactment are to be given their usual and ordinary meaning in the context in which they are used.

[70] If “accepts” were read as broadly as the City suggests, then unintended consequences would abound. Such a definition would capture any telephone carrier since they are in the business of connecting calls and some of the calls they connect are certainly to request taxicab or limousine transportation. If a conscious decision to “accept” requests for taxicabs by the automated systems of the carrier is not required, it is a virtual certainty that both wired and wireless telephone carriers “accept” thousands of calls per day in their system that happen to be from passengers looking for taxicabs or limousines. Since the telecom carrier’s business is to “receive” and “relay” such calls (among millions of others), such telecom carriers would require a limousine service company license on the City’s strained interpretation. An over-broad

“accepts” definition might also capture cell phone-based automated services such as “#taxi” that connect users to the nearest licensed taxicabs (or taxicab brokers) at locations across the country without need of looking up local numbers. Many popular smartphone apps that provide links to connect users to local businesses being searched including taxicabs and limousines could also be captured. This sort of over-broad regulation was neither contemplated nor intended when the by-law was drafted and the word “accepts” was selected in lieu of the more generic “receives”. Indeed, the desire to *exclude* such businesses from the scope of the regulation is very likely the reason for the use of the more restrictive “accepts” wording.

[71] A review of the contractual terms governing the license granted to users (drivers or riders) of the Uber App and of other provisions of c. 545 of the Code support the view that a call or request for a taxicab or limousine is accepted only at the point where a human being (in this case, the driver) has intervened in some fashion to exercise judgment or discretion.

[72] The User Terms associated with the Rider App make it clear that Uber B.V. itself is providing “information”, “allowing you to send a request to” a driver, using efforts to “bring you into contact” with a driver but is not itself providing a transportation service and “only acts as a passive conduit”. None of this is consistent with the concept of “accepts” as defined in the dictionary. To similar effect, the Partner Terms associated with the Driver App make it clear that Uber B.V. or Rasier as the case may be are only offering “information” or “lead generation”.

[73] While arguably somewhat self-serving and not necessarily definitive of the actual activity undertaken by any of the respondents, these contractual terms are consistent with the evidence that Uber adopts a passive, purely mechanical (if sophisticated) role in enabling the two protagonists (driver and passenger) ultimately to connect with each other and form an agreement and is not a party to the underlying agreement when formed.

[74] The by-law itself also provides indications as to what is intended by the word “accepts”. Article VII of c. 545 contains the detailed regulations governing taxicab brokers. Section 545-127 provides that “Every taxicab broker ...shall punctually keep all his or her appointments or engagements and shall not *accept* any engagement that a previous appointment would prevent

him or her from fulfilling; provided, however, that he or she shall not be compelled to *accept* any order from a person who owes him or her from a previous fare or service” (emphasis added). Taxicab brokers are required by section 545-124(5) to keep a “list of all complaints or compliments received concerning...taxicabs having the right to accept requests for service from such broker” (emphasis added). The word “accept” in these provisions clearly involves an element of decision and discretion being consciously exercised and cannot be reconciled to a purely automated, if sophisticated, relaying function.

[75] Where the same word (“accepts”) is used in several places in the same enactment, it should be presumed to have the same meaning. When Article VII of c. 545 uses the word “accept” it clearly infers an element of conscious decision making (“accept any order”, “accept any engagement” or “accept requests for service”). The same construction should apply to Article 1 of c. 545 when “accept” is used in the definitions of limousine service company and taxicab broker.

[76] The taxicab broker’s telephone operator receiving a call from a prospective customer clearly “accepts” the request for a taxicab or limousine when they receive the call and agree to send a car as requested. Conversely, if the operator were to decline a call because of a previous unpaid fare, for example, s. 545-127 excuses his or her employer from “accepting” that particular call. Under s. 545-127, an operator cannot avoid “receiving” a call, but he or she can avoid “accepting” one. In all of these instances, the Code has used “accept” in manner which is clearly beyond merely “receive” or “relay”.

[77] Uber’s peer to peer process operates, in a sense, as a super-charged directory assistance service. Indeed, many internet apps are available today which enable a smartphone to identify the name and address, phone number and web site of the nearest *static* seller of almost any good or service. Many of them supplement this information with user ratings. Pressing links on the apps will direct the user to the web site of the service provider (eg. Restaurant or hardware store) or connect a telephone call. The innovation of the Uber App is that, in effect, it is able to identify service providers (in this case, drivers) who are not static but constantly mobile. While

the software design behind such applications may be clever, and even ingenious, the purely automatic relaying and connection role they undertake is the 21st Century version of what telephone exchanges were to the 20th Century. Neither can be described as “accepting” the calls or requests of users in any usual sense of the word when no human interaction or discretion is involved.

[78] I find that the word “accepts” as used in c 545 of the Code requires the intervention of some element of human discretion or judgment in the process and cannot be applied to a merely passive, mechanical role of receiving and relaying electronic messages. The fact that technology has evolved to the point where mechanical switches can be as “smart” and efficient as human operators once were does not alter the meaning of the language employed.

[79] Examining the process by which a passenger utilizes the Rider App to look for a driver willing to provide transportation in light of the above discussion of the meaning of “accept” makes it clear that the only point in the process where there can be anything identified as “accepting” a request for service is when the driver signifies his acceptance of the passenger’s request by so signifying within the Driver App.

[80] The passenger looking to find a driver must open an account with Uber B.V. after first downloading the Rider App anywhere in the world over the Internet. The software is in place on her phone long before any specific trip is intended, let alone a trip specifically in Toronto. Downloading the software and opening an account implies no obligation ever use it. There is nothing more than the potential that the software *might* be used to arrange transportation at this point.

[81] Uber B.V. alone interfaces with the potential customer at the point where an account is opened with the prospective Rider App user. On the evidence before me, Uber B.V. itself does *nothing more* until *after* the driver has already showed up at the door of the prospective passenger. Uber B.V. neither receives nor relays anything in relation to any specific trip before it occurs. Its role in opening an account with a rider may well be assisting the rider in locating

unlicensed limousine drivers, but Uber B.V. does not actually do so when a specific trip is in mind.

[82] Pursuing the chain of events to the next level, the prospective passenger opens her smartphone and activates the Rider App. She selects a desired category of service and hits “send” to request a car. The passenger and her phone are the only players in the process at this juncture. If her phone were said to “accept” the call when she presses the send button, the phone is neither operated nor controlled by any of Uber.

[83] The request next heads out over the Internet heading towards a server in Northern California. To get there, of course, the message must pass through multiple servers and nodes on the Internet, each of which receives the message and relays it onwards towards the intended destination. None of these intermediary relay stations on the Internet knows more about what it is relaying than a pony on the Pony Express knows about the contents of the mail it carries. Each “receives” the data packet requesting a driver sent by the would-be passenger. None, however, “accepts” the data, since their intervention is purely automatic.

[84] Next the data arrives at the servers in Northern California. There is no suggestion that Uber owns or operates the servers whose owner/operator was not identified at the hearing. The servers have software systems which are able to generate data about traffic, customer demands and the like. As well, the systems are able to direct the request to the nearest driver whose Driver App indicates he or she is available.

[85] Once again, there is nothing “accepted” by the server. Like the Internet switches that preceded it, the server does no more than relay. The server may act as a smart phone directory, but it is only acting as a phone directory. No appointment is given or accepted as is the case with a human dispatcher/operator.

[86] Lastly, the data packet arrives on the dashboard of the prospective driver whose Driver App has been activated on his smartphone. There, the Driver App translates the data into a request and gives the driver 15 seconds to consider it. At this point, if the driver does nothing,

then nothing has been accepted and the data packet resumes its journey back to the server and on to another driver.

[87] When a driver presses “accept”, it is finally possible to say that someone has undertaken to arrange transportation for someone else. The only person doing the accepting is the driver. Prior to that point, nothing has been accepted and all is purely algorithm-driver data relay in which Uber has not been shown to play any actual active role.

[88] Uber Canada has no role whatsoever in this process. It helped recruit drivers, it assists in customer relations generally, but it has nothing to do with the process of a passenger seeking a driver with a car at the point where the passenger puts her virtual hand in the air to “hail” a car over the Internet. There is simply nothing in Uber Canada’s limited role that approaches the concept of “accepting” any instructions from a passenger as regards booking any specific transportation.

[89] Rasier does license the Driver App to some drivers (Uber X and Uber XL) and Uber B.V. licenses it to others. However, it is the driver himself and not Uber B.V. or Rasier who actually accepts. Uber B.V. and Rasier are involved in opening an account with the driver, but have no role in the actual reception of a request or its acceptance on the evidence before me.

ii. No “calls” involved in operating Rider App

[90] Given my conclusions as to the meaning of “accept” in the definition of “limousine service company” (which apply equally to “taxicab broker” which uses the same phrase) it is not strictly necessary for me to consider whether the phrase “calls in any manner” can be construed to include the type of internet traffic generated by the Rider App or the Driver App. However, as the matter was extensively argued before me, I shall do so.

[91] It is my conclusion that the use of the word “calls” in the phrase “accept calls in any manner” as used in the definition of limousine service company reinforces my conclusion that the word “accepts” requires an element of human assessment and intervention. In so finding, I rely on the principle that different words used in the same enactment should presumptively bear

different meanings (the principle of consistent expression), legislative history and the ordinary meaning of the word as supplied by dictionary definitions.

Principle of consistent expression

[92] The City's proposed interpretation would draw no distinction between "calls in any manner" and "requests in any manner". The latter phrase is used in the definition of taxicab broker. The interpretation suggested by the City would accordingly result in the two definitions effectively being given the same meaning despite the different words deliberately used.

[93] The presumption of consistent expression would suggest that different words selected by the legislator should ordinarily be given different meanings. Writing for the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Procedures)*, 2013 SCC 36, LeBel J. held (at para. 81):

"First, according to the presumption of consistent expression, when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings."

Legislative History

[94] The legislative history of "taxicab broker" contrasted with "limousine service company" shows that both terms have a common origin that only very recently diverged. While the complete legislative history of taxicab broker is not before me, the parties did provide me with the 1969 version of what is now c. 545 of the Code. At that time, "cab" was defined to include "taxicab or livery cab" (the latter being the former designation of "limousine"). The definition of "taxicab broker" formerly used the same language of "accepts any *calls* in any manner" which same language was later incorporated into the definition of limousine service company when that business was eventually brought under the regulatory umbrella.

[95] The definitions remained similar (“accepts calls in any manner”) until 2014. By-law 503-2014 passed on June 13, 2014 deleted the word “calls” in the definition of taxicab broker and replaced it with “requests”. No corresponding change was made to the definition of limousine service company.

[96] By-law 503-2014 arose from a decision of City Council dated February 19-20, 2014 approving Appendix D to the Final Report which had recommended the change. Appendix D of the Final Report recommended changing “calls” to “requests” in the definition of taxicab broker since:

“References to 'calls' for service do not capture the various ways which individuals can now obtain taxicab service, including by phone, email and smartphone applications”.

No corresponding recommendation was made to change the related definition of “limousine service company”.

[97] While the City suggests that this legislative history should not be given any weight, arguing that “limousine service company” was not altered at the time, because only the taxi industry was then being reviewed, the argument is not persuasive. Limousines and taxicabs are clearly a closely related industry and the Final Report makes numerous references to the limousine industry and its regulatory environment even if an overhaul of it was not the focus of the report.

[98] Further, if the City amended “calls in any manner” to “requests in any manner” in the taxicab broker context for fear that the former was less broad and less likely to capture modern means of communication, the mere fact that the similar defined term in the limousine industry was not examined at the time is no argument for the proposition that the amendment itself (changing “call” to “request”) was a purposeless or unnecessary precaution.

Dictionary Definition

[99] The Oxford English Dictionary (8th Ed, 1990) defines the noun “call” as follows:

“1. a shout or cry; an act of calling. 2 a the characteristic cry of a bird or animal. b an imitation of this. c an instrument for imitating it. 3 a brief visit (*paid them a call*). 4 a an act of telephoning. b a telephone conversation. 5 a an invitation or summons to appear or be present. b an appeal or invitation (from a specific source or discerned by a person’s conscience etc.) to follow a certain profession, set of principles, etc. 6 (foll. by *for*, or *to* + infin.) a duty, need, or occasion (*no call to be rude*, *no call for violence*). 7 (foll. by *for*, *on*) a demand (*not much call for it these days*; *a call on one’s time*). 8. a signal on a bugle etc.; a signaling-whistle. 9 *Stock Exch.* An option of buying stock at a fixed price at a given date. 10. *Cards* a a player’s right or turn to make a bid. b a bid made.”

Conclusion re “calls in any manner”

[100] In my view, it is simply not reasonable to construe “accepts calls in any manner” as if it read “relays requests in any manner”. There is simply no usual and ordinary meaning of the words which will admit of a purely mechanical relaying of data by a computer.

[101] Viewing the two definitions (limousine service company and taxicab broker) side by side, having regard to their common origins, the dictionary meanings of “call” and applying the presumption of consistent expression as re-affirmed in *Agraira*, I would interpret “calls” in the limousine service company definition as referencing phone calls. At the very least, the phrase suggests to me a medium of communication with an active participant at the receiving end (such as a dispatcher or telephone service) as opposed to a purely automatic relaying or switching function as is the case with data transmitted from the Rider App.

[102] It follows that the purely automatic, algorithm-driven process of an automatic server directing packets of data containing electronic “requests” over the Internet from the rider’s smartphone to drivers who may wish to accept them cannot be characterized as a “call”. The

ordinary meaning of “call” simply cannot extend as far as the City would seek to extend it. An automatic data relay does not receive a call on any but the most strained of interpretations.

iii. Role of Uber

[103] The only function in the Uber business structure (viewed broadly) that the City has been able to point to in its argument as coming close to the concept of “accepts calls in any manner for booking, arranging or providing limousine transportation” is that of relaying the message sent from the prospective passenger to the prospective driver. There is simply no evidence before me that *any* of the Uber companies who are respondents have any role in that relay function. The owner of the Uber App (Uber Technologies Inc.) is not before me; neither the owner nor operator of the servers in Northern California were identified.

[104] While the City made much in argument of its “walk like a duck” metaphor, the simple fact of the matter is that it does not require ducks to be licensed. None of the ancillary aspects of Uber’s business – recruiting drivers, marketing, billing, customer relations and the like – is subject to a requirement to obtain a license. Accepting calls for transportation does require a license and Uber does not do that.

iv. Conclusion re limousine service company

[105] Accordingly, I find that requests for limousines (as defined in c. 545 of the Code) made by individuals in Toronto through the use of the Uber Rider App are neither “accepted” by Uber nor are they “calls” as those terms are used in the definition of limousine service company in s. 545 of the Code. Uber is not carrying on the business of a limousine service company requiring the application for a license pursuant to Article II of c. 545 of the Code.

(c) Does Uber operate a Taxicab Broker Business?

[106] Given my findings regarding the definition of “taxicab”, it is clear that the definition of “taxicab broker” is only relevant to Uber Taxi and Uber Access (a small part of the overall Uber business in Toronto). While it is true that the “taxicab broker” definition was updated somewhat

in 2014 with the change from “calls in any manner” to “requests in any manner”, the change was not sufficient to alter my conclusion.

[107] The lack of any role of the Uber respondents in “accepting” any request for taxicabs is dispositive. The balance of my reasons in relation to “limousine service company” apply equally to taxicab broker. There is no evidence that any of the Uber respondents is operating a taxicab broker business.

(d) Charter of Rights and Freedoms s. 2(b)

[108] In light of my finding that Uber is not carrying on a business in Toronto that is required to be licensed as a limousine service company or taxicab broker, I have not found it necessary to examine the alternative argument raised by Uber that the requirement to obtain a license of limousine service companies or taxicab brokers is a breach of their Charter protected right of freedom of expression contrary to s. 2(b) of the Charter of Rights and Freedoms.

Disposition

[109] The application is dismissed with costs payable to the respondents. If the parties are unable to agree on a figure, I shall set a timetable for the delivery of *short* written submissions on the point.

Sean F. Dunphy, J.

Released: July 03, 2015

CITATION: City of Toronto v. Uber Canada Inc. et al., 2015 ONSC 3572
COURT FILE NO.: CV-14-516288
DATE: 20150703

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

City of Toronto

Applicant

– and –

Uber Canada Inc., Uber B.V. and
Raiser Operations B.V.

Respondents

REASONS FOR JUDGMENT

Sean F. Dunphy, J.

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