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Uber & Calgary - A Modern Day Romeo & Juliet

By: Theresa Yurkewich

The days of ride-sharing programs are nothing new, but with Uber's recent opening in Edmonton, there is no doubt that it will soon make its way to Calgary. However, Uber is not the first taxi-alternative to make a run at the Calgary market. Blue & white Car2Gos can be seen populating the city, and especially the downtown core, where users sign up with their payment information and driver's license in order to rent easy-to-park vehicles on a per-minute basis. These cars can be reserved using a mobile app or web browser and payment is electronically transferred when the ride ends.

But Car2Go isn't the only ride-sharing program in Calgary – a simple search on Kijiji will find various drivers offering rides, Carpool.ca will match riders with drivers, and there are other start-ups in the works. This post will consider the legal regime governing ride-sharing, with a focus on Calgary, while identifying some of the legal issues that these programs might face when operating within a municipality.

What is Uber?

Uber is a ride-sharing mobile application which allows users to book drivers (similar to a taxi brokerage service), input their credit card information, and track the location of those drivers on their way to pick up. The drivers, hired by Uber (after conducting a criminal background check), arrive in their personally owned sedans and their fares are based on time and distance. Prior to booking, both the rider and driver can view each other's profiles (built from customer feedback) and see the estimated fare. Upon acceptance, the money is electronically transferred.

The app searches for riders travelling the same direction and encourages them to share rides by providing incentives such as a reduced fare. For riders who agree to share an Uber, the payment is divided and their credit cards are charged equally. As www.uber.com states, in enabling customers to split fares, their service is the end of pay-me-backs and IOUs.

There are four divisions within Uber. UberTAXI is similar to a standard taxi service with licensed drivers. UberBLACK and UBERLUX are made up of professional chauffeurs with commercial licenses, and UberX is made up of drivers over 21 years of age, who possess personal auto insurance and a well maintained vehicle. All rides are covered by Uber's commercial liability insurance policy, and vehicles must be safe and of high quality. Rides are requested through the app and then each trip is archived within the application, which includes reviews of both the driver and rider.

Uber is currently available in 252 cities (and 53 countries) and is expanding. But, in recent months it has received a heavy dose of backlash from taxi companies and law makers. The fact that Uber operates through a mobile application, allowing individuals to hail a ride with the click of a button, is what makes it unique. However, it is possibly Uber's *laissez-faire* approach to the law and its vocalized "play to win" attitude that has spawned negative attention from municipalities and taxi companies in the past year.

Regulation of Taxi Services by Municipalities

A municipality has the power to regulate the taxi industry provided it acts within the boundaries of provincial legislation and confines its regulation to business occurring within the municipality itself. Under the *Municipal Government Act,* RSA 2000, c M-26, municipalities have the power to make bylaws regulating transportation systems (section 7) and regulate, prohibit, and provide for a system of licenses (section 8). Through limiting the number of taxi licenses available, municipalities create a market and increase or decrease the value of a license.

Revenue received through regulating licenses must be closely related to the municipality's licensing costs; otherwise, the municipality is *ultra vires* its constitutional powers. For example, in *Surdell-Kennedy Taxi Ltd v Surrey (City of),* 2001 BCSC 1265, the power to sell licenses by auction was not fairly implied from the municipality's power to license and regulate. In order to characterize an auction price as a license fee, the price was required to be directly related to the municipality's cost of administering the licensing (see paras 35-36, 57).

Case Study: The City of Calgary

Are Uber vehicles subject to regulation?

The first step to determine whether regulation of the Uber service is valid is to examine whether the service fits within the definitions provided by the City of Calgary's Livery Transport Bylaw, 6M2007. The Bylaw does not apply to a motor vehicle, other than a taxi, accessible taxi, or limousine that is carrying passengers pursuant to a contract with the city.

A Limousine is a motor vehicle including a stretch-limousine, sedan-limousine or specialized limousine with a valid limousine plate license attached to it. The term of note is a "Sedan-limousine" – a Lincoln or Cadillac, which has not been altered in any way, seats 6 people maximum, has a frame 6 inches longer than a standard Lincoln or Cadillac, and is no more than 8 years old (section 42).

The definition of taxi is much simpler – a motor vehicle with a valid taxi plate license affixed to it (section 12 (qq)). This definition raises the question of whether a driver can avoid regulation by merely not affixing a license so that their vehicle does not meet the definition of a limousine or taxi. This would certainly be the position Uber takes, as their drivers do not carry taxi or limousine licenses.

The short answer to this question is no. The Bylaw provides that "No person shall advertise or offer a motor vehicle for hire unless that motor vehicle has a valid taxi plate license, accessible taxi plate license, or limousine plate license joined to it" (section 25). The same goes for charging a fare to carry passengers or even just operating a motor vehicle suggesting it is for hire (sections 26 and 27).

Regardless of whether Uber vehicles are taxis or limousines, it is clear the service is captured by the Bylaw. In the most basic sense, vehicles are offered for hire and charge fares to carry passengers. Fines for operating, charging a fee, or suggesting a vehicle is for hire without a license range from $800-$1500 (Schedule "D") per offense.

Bylaw Logistics and the Regulation of Minimum Fares

Under the Livery Transport Bylaw, limousines must be previously arranged (section 50), which means entering into an agreement 30 minutes prior to pick up. Although this can be achieved by booking a ride through Uber's mobile app, the strict 30 minute requirement means users will have to put some foresight into their ride requests.

The annual license fee for a limousine plate in 2015 is $703, $877 for a taxi plate, $1753 for a brokerage license application, and $1753 for an annual brokerage license (Schedule "B"). Additional to these fees are others such as those for inspection, bylaw, police check, and license replacement. The fee may be steep for drivers, but Uber would likely recoup these fees in profits.

But setting aside the waiting time and the costly license fees, it appears Uber's main challenge in being classified as a limousine service is the minimum fare requirement. A limousine cannot be offered or advertised for a trip less than $84.60 per hour, regardless of the length of trip, time of trip, or number of passengers (sections 47-49, Schedule "A"). All of a sudden, that quick 10 minute "Uber" to work is costing close to $85. Drivers who disobey the bylaws will face fines ranging from $200-3,000.00 per offence (Schedule "D").

An $85 fare for a 10 minute ride is preposterous, and will easily destroy the benefit of Uber. This would explain why Uber is adamant to operate outside the confines of the Bylaw, or often limits itself to the development of UberX, which does not use limousines.

However, even UberX faces its challenges. It constantly battles with the media and taxi industry to prove its methods of hiring are safe and reliable and to convince the public that an insurance policy does exist. Examples of this debate are seen in Calgary taxi companies join national anti-Uber campaign, *The Calgary Herald* (November 9, 2014) and Jesse Kline: Uber offers salvation for taxi-starved cities like Calgary. Why do they resist?, *National Post* (December 22, 2014).

Further, the strict fare regulations (Schedule "A") make it difficult for Uber to compete by introducing lower prices. In addition to the rules surrounding minimum fares, there are conditions surrounding requirements such as transfers and the maintenance of log books.

There has been a constant battle between The City of Calgary and the public over the accessibility and cost of taxi services. As stated in Jesse Kline's article on Uber (above), in 1986, the City capped the number of taxi licenses at 1,311. In the years up to 2014, only 255 licenses were added – even though the population had vastly grown. Finally, in September 2014, the City issued 383 new licenses in attempts to curb public outrage, however, as of December 5, 2014 only 37 new taxis had actually been added. This is not due to a lack of interest in purchasing new licenses, but due to delays in process. In fact, according to Taxi license auction adds 126 plates, *The Calgary Herald* (October 28, 2014), there were nearly 2,000 applicants for one of these taxi plate licenses.

Advancements in technology such as Uber or FastCab attempt to deregulate the industry and solve the problem of supply, demand, and driver wages; however, they are stifled by onerous regulations such as minimum fares and advanced booking requirements.

Can a Municipality Regulate Competition?

To determine the validity of a bylaw, its purposes must first be examined. Reading the preamble of the Livery Transport Bylaw, its purpose is to ensure public safety, service quality, and consumer protection in addition to establishing a regulatory mechanism and maintaining a sustainable industry.

This sounds like an important objective – but what if through the municipality's attempts to protect consumers, it is really preventing lower fares, limiting efficiency, and pushing away start-ups that offer to meet consumer demands in the free-market? What this really sounds like, is a municipality regulating competition.

As stated above, municipalities are given the power to regulate under the *Municipal Government Act.* Further ability is provided through delegation of the provincial power to legislate on property and civil rights (section 92(13) of the *Constitution Act, 1867)*, but, this power often intersects with the exercise of the federal government's power to regulate trade and commerce through developing competition legislation (section 91(2) of the *Constitution Act, 1867*; see also *General Motors of Canada Ltd. v City National Leasing Ltd*., [1989] 1 SCR 641).

A municipality's decision to act must be for a *bona fide* purpose (reviewable on the standard of correctness) as stated in *Edmonton Flying Club v Edmonton (City),* 2013 ABQB 421 (see para 89). *Catalyst Paper Corp v North Cowichan (District),* 2012 SCC 2 clarified that this means councillors may consider social, economic, and political factors relevant to voters (see para 30).

In *Associated Cab Limousine Ltd. v Calgary (City of),* 2006 ABQB 32, the court stated:

> There is nothing to prevent the Province from delegating to municipalities the regulation of local business. The regulation of the limousine and taxi business in the City of Calgary is a bona fide municipal purpose…Implicit in the power to regulate such business is the power to consider and regulate the issue of competition between such local businesses (see para 17).

Further, citing *Shell Canada Products Ltd. v Vancouver (City)*, [1994] 1 SCR 231, "the incidental regulation of competition between industries is not incompatible with the broad purpose of providing services that are necessary or desirable for all of a municipality, or with the regulation of the City's transportation systems" (2006 ABQB 32 at para 22).

Municipal powers must be interpreted with a "broad and purposive approach", as stated in *Municipal Parking Corp v Toronto (City)* (2009), 314 DLR (4^{th}) 642, [2009] OJ No 5017 (SCJ). In *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City),* 2004 SCC 19, the Court applied a broad and purposive interpretation to the *Municipal Government Act*, in determining that a municipality has the power to limit the number of taxi plate licenses as a result of this power to regulate and provide for a system of licenses.

Further, in *Associated Cab Limousine Ltd.* (above), the Court found that section 8 of the *Municipal Government Act* permits municipalities to treat businesses differently (i.e. a taxi and a limousine service). Imposing minimum hourly rates for limousine services has been justified on the basis that they are an upscale alternative and not a necessity. These minimum hourly rates, higher than those of a taxi, were upheld by the Alberta Court of Appeal in *Associated Cab Limousine Ltd. v Calgary (City of),* 2009 ABCA 181.

Parks West Mall Ltd. v Hinton (Town), [1994] 3 WWR 759, 15 Alta LR (3d) 400 has illustrated that courts are very reluctant to quash a bylaw and rule that a municipality has not acted in the public's best interest. A policy will not be overturned without sufficient evidence of bad faith – meaning, made with an improper purpose, impropriety, improper conduct, or illegality.

Merely a corrupt motive or dislike of the policy by the public is not sufficient, as demonstrated in *Hollett v Halifax (City),* (1975), 66 DLR (3d) 524 (NSCA). In this case, the applicant illustrated that their notice of application for a permit was a catalyst to the bylaw, that their economic interests would clearly be affected, and that the municipality operated against the advice of their advisors, yet, this was not sufficient to quash the bylaw.

To disturb a municipality's determination of the public interest, a "good and sufficient" reason must be given. Discussed in *Nanaimo (City) v Rascal Trucking Ltd.*, 2000 SCC 13, this high standard requires evidence of a "clear demonstration" (see para 36). Without proof of bad faith or improper purpose, a party cannot establish that the City has not acted in the public interest or for a *bona fide* municipal purpose – regardless of how individuals feel about it. The effect of limiting competition is not improper provided the initial reasoning behind it was made with good intentions.

But what about the federal *Competition Act,* RSC 1985, c C-34? Surely that must prevent a municipality from inadvertently regulating competition? *Edmonton Regional Airports Authority v North West Geomatics Ltd.,* 2002 ABQB 1041 describes the *Competition Act* as "consumer protection legislation designed to protect the public from business practices which interfere with the operation of normal market practices such as to allow the public access to goods and services in a competitive market environment" (see para 130).

However, in *Toronto Livery Association v Toronto (City),* 2009 ONCA 535, the Court found that regulation of the taxi and limousine business is a *bona fide* municipal objective, incidental to which can include the power to "consider and regulate competition" in the public interest (see para 84). As such, Toronto's bylaw regulating the limousine business did not offend the *Competition Act*.

Similar regulation of competition has been upheld in cases such as *698114 Alberta Ltd. v Banff (Town of)*, 1999 ABQB 59, in which a municipality wished to limit commercial growth and preserve uniqueness. In doing so, it established an annual lottery which regulated commercial development. Without this restriction, development in the area would have been highly competitive. The Court however upheld the bylaw based on the powers given to a municipality to regulate (which inadvertently can include decreasing competition itself).

There is an exception to this general rule – a bylaw which creates a monopoly will violate a municipality's powers of regulation. A municipality's right to regulate must be general and affect all who come within the scope of the legislation. As stated by the Alberta Court of Appeal *in United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City of)*, 2002 ABCA 131, "where a bylaw is not prohibitory altogether but prohibitory to one and permissive to another, in effect, it is discriminatory in nature, open to favouritism and tends to create a monopoly" (see para 76). Although competition can be regulated, it must not be unduly inhibited.

A further limit is that without an express statutory provision, a municipality's power to regulate does not include the authority to completely prohibit individuals from engaging in an occupation or trade. A license or permit process that is so onerous that it practically prohibits the obtaining of a permit or license constitutes an impermissible prohibition. However, this is not to be interpreted in the same manner as regulation of entry into an employment or profession (see 2002 ABCA 131 at paras 83-84, 117).

Conclusion

The requirement for minimum fares – whether for taxis or limousines – doesn't do much to help competition, but it is entirely within the purview of The City of Calgary's powers. However, at the end of the day, consumers are looking for the quickest ride at the lowest price. By regulating the lowest fare a driver can charge (or imposing higher rates for more "luxury" vehicles), there is no ability – or incentive – for a service like Uber to cut costs and offer cheaper service. The public may not back the City's decision, but without evidence of bad faith, the municipality is presumed to operate in the public's best interests.

With the courts supporting a municipality's power to inadvertently regulate competition and the ability of the municipality to justify a *bona fide* purpose for regulation, it appears that if Uber wishes to operate legally, it has no recourse but to avoid Calgary, play by the rules, or lobby policy makers. Surely their "play to win" attitude suggests a preference for the latter. But, without a change of heart by local regulators, it seems Calgary and Uber will forever be kept apart.