

Catch Me If You Can

By: Theresa Yurkewich

Case Commented On: *R v Sandhu*, [2015 ABQB 827](#)

Mr. Sandhu, the respondent and an Uber driver, was charged with operating a business without a license ([City of Edmonton, Bylaw No 13138](#)) as well as operating a vehicle for hire without a taxi plate ([City of Edmonton, Bylaw No 14700](#)). His charges arose as part of an undercover sting, carried out by the City of Edmonton, into suspected Uber drivers. Mr. Hykawy, a municipal enforcement officer, downloaded the Uber application and used it to locate a vehicle which happened to be operated by Mr. Sandhu. Mr. Hykawy's volunteer, Ms. Lenz, then approached Mr. Sandhu's vehicle and confirmed Mr. Sandhu was operating as an Uber driver. She advised him that her Uber app was not working and then offered him a cash payment for a ride.

At trial, the Commissioner limited the issue to whether on the day in question, at the moment in question, Mr. Sandhu was committing one of the two offences. Commissioner Yaverbaum indicated that he must decide whether there was a sale or not and further, whether there was actual acceptance by taking cash to provide services. As such, he limited the scope of the Crown's cross-examination of Mr. Sandhu to the transaction that occurred between him and Ms. Lenz.

During testimony, there were contradicting statements from Ms. Lenz, who stated her payment was accepted, and Mr. Sandhu who denied accepting such payment. Mr. Sandhu testified that he was an Uber driver at the time and was waiting to pick up a passenger, but that he only let Ms. Lenz into his car to warm up. During this time, he demonstrated to Ms. Lenz that he would have to go offline to provide her with a ride, and that he was not willing to do so. Ultimately, the Commissioner could not convict Mr. Sandhu as he had a reasonable doubt, and granted an acquittal. The Crown appealed that decision to the Court of Queen's Bench, and a new trial was ordered. This article provides commentary on that decision.

The right to appeal an acquittal of the Commissioner is limited to questions of law, and the Crown alleged three errors (at para 17):

- The Commissioner erred in limiting his analysis to the evidence relating to the undercover sting;
- The Commissioner unduly restricted the Crown's cross-examination of Mr. Sandhu; and
- The Commissioner erred in failing to consider whether there had been an advertisement of services as contemplated in the *Municipal Government Act*, RSA 2000, c M-26, section 564.

The Crown argued that although proof of a transaction is sufficient to establish a business operation, it is not necessary. Given Mr. Sandhu's admissions that he was an Uber driver and

was waiting for a call at the time of the transaction, the Crown argued there was sufficient evidence that he was operating a business as well as a vehicle for hire. Further, the fact that Mr. Sandhu advertised his services through the Uber app was *prima facie* proof that a business existed (at paras 21-28).

In response, however, Mr. Sandhu argued that the Crown had the obligation to prove its case, including the date and time as framed in the charging documents. It is these particulars that Mr. Sandhu argued allow an accused to make an informed decision on the conduct of their defence, including when to testify and the possible consequences of that decision. In his opinion, when the Crown extended its examination to details of his relationship with Uber, it widened the scope of the case and he was no longer clear of the case he was to defend against (at paras 29-33).

In review of the Commissioner's decision, Justice Shelley stated that the evidence must be considered as a whole when determining whether the Crown has proven its charge beyond a reasonable doubt. In regards to Bylaw 13138, the Commissioner was obliged to determine whether Mr. Sandhu was operating a commercial activity or undertaking or an activity which provided goods and services. For Bylaw 14700, the Commissioner was to determine whether Mr. Sandhu was driving or in care and control of a vehicle offering transportation in return for a fee (at paras 35-37).

Proof of a transaction is only one piece of evidence and should not be wholly determinative of the Crown's success. You may at this point recall Veit J's statement in *Edmonton (City) v Peter*, [2015 ABQB 635](#) (at para 43, as I discussed [here](#)), that a "business that never concluded any transaction would be an unsuccessful business, but it would be a business all the same." In Mr. Sandhu's case, the Court, therefore, ruled that the Commissioner incorrectly focused his decision on the success of the particular transaction. Although he was entitled to consider its success, it was not necessarily determinative of guilt (at paras 41-42).

In light of this error, the Court noted that it is reluctant to overturn acquittals. Rather, the onus is on the Crown to establish that the Commissioner's errors might have had a "material bearing on the acquittal"; not, however, that the verdict would have changed (at para 20). In this case, a number of Mr. Sandhu's admissions would have been sufficient to establish the facts of conviction, including that he was an Uber driver, he was logged into the Uber application and waiting for a call, that he was available for hire, and that he would provide Ms. Lenz a ride if she requested it through the Uber application. Had the Commissioner focused on the evidence as a whole, including these uncontroverted admissions, the Court determined it was reasonably certain that this evidence would have had a bearing on the outcome of the Commissioner's decision (at paras 46-48).

Mr. Sandhu argued that it would be unfair to convict him on a basis other than what was introduced in the Crown's case in chief. Because evidence was led primarily with respect to the specific transaction, changing the scope of the case would have violated his ability to fully answer and defend himself. As a general rule, however, the Crown is not bound to prove its theory, but only the essential elements of the offence. Where particulars are not given and the Court is capable of capturing alternative bases for conviction, it is an error to grant an acquittal simply because the path differs from the one offered by the Crown. Here, it was not clear to the

Court that the Crown limited itself to a particular theory of liability. If it did, however, a conviction based on being an Uber driver was likely part of its original theory. The Crown led sufficient evidence in Ms. Lenz's testimony to put Mr. Sandhu on notice that he might be convicted on the basis of operating as an Uber driver, such that he could tailor and provide his testimony in response, as needed.

In summary, the Court ruled that the Commissioner erred in acquitting Mr. Sandhu based on the success of the transaction, rather than examining the elements of the offence and the evidence as a whole. The Court allowed the appeal and ordered a new trial (at paras 64-66).

This case reflects an ongoing dispute between municipalities and Uber, as Uber seeks to provide ride-sharing services that extend beyond a regulatory scheme and does so in a bull-dog fashion. Last year, the City of Edmonton failed to thwart Uber with an injunction (see *Edmonton (City) v Uber Canada Inc.*, [2015 ABQB 214](#) as discussed [here](#)), and in response, cracked down on the Uber drivers instead, hoping to make the form of employment less enticing. The City of Calgary, however, learned from Edmonton's mistakes and was successful in obtaining an injunction against Uber drivers in November 2015, in front of Justice G.H. Poelman (unreported). It is now working with municipal interests, including Uber and taxi companies, to develop a regulatory scheme that will capture this new trend towards sharing services.

Municipalities have perhaps realized that these sharing models are becoming more prominent in society and in fact, demanded by many of their citizens, and as such, traditional ways of thinking must be adapted. If not, the Court's decision here will certainly provide some direction for enforcement officers looking to catch Uber drivers, and conversely, to Uber drivers hoping to avoid similar charges.

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