

TO AIR (BnB) IS HUMAN: REGULATING THE SHARE ECONOMY

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I. INTRODUCTION

This paper will focus on two of the most prominent businesses utilizing the share economy: ride share services such as Uber, and services that facilitate short term vacation rentals such as AirBnB. The discussion of local government regulation of these businesses may also help inform local governments about issues that arise in regulating other share economy businesses such as who can be regulated, the nature of the regulation that can be applied and how to enforce such regulations. This paper will not provide specific policy suggestions as to the form that regulation should take, but will hopefully assist local governments in identifying and focusing on the regulatory considerations that arise when responding to public interest concerns regarding share economy businesses.

II. WHAT IS THE “SHARE ECONOMY”?

In 2013, an article in *The Economist* sought to provide an explanation to its readers of the “Rise of the sharing economy”. Although not providing a definition, the article highlighted how people are now increasingly willing to “share” their goods and ability to provide services through the internet:

... technology has reduced transaction costs, making sharing assets cheaper and easier than ever—and therefore possible on a much larger scale. The big change is the availability of more data about people and things, which allows physical assets to be disaggregated and consumed as services. Before the internet, renting a surfboard, a power tool or a parking space from someone else was feasible, but was usually more trouble than it was worth.¹

The share economy is a change in the market as a consequence of websites and internet-based software (popularly known as “apps”) reducing much of the hassle of brokering an agreement to use someone else’s property or willingness to offer services by reducing transaction costs.

The reduction in “peer-to-peer” transaction costs through the Internet is not limited to cheaper advertising of goods and services by the offeror. For example, a person might respond to a newspaper ad for a property by telephoning the owner, asking for a more detailed description of the property and discussing availability. These communications may have also helped to build or destroy trust needed for both parties to agree to a short-term vacation rental. Through the Internet, the prospective renter can now view photos, “virtual tours” and online reviews evaluating both the property and the owner. On some websites, such as AirBnB, renters can also maintain a ‘profile’ so the owner is increasingly able to read reviews regarding the quality of the guest.

¹ “Rise of the sharing economy” *The Economist*, March 9, 2013

It appears that now that inquiries regarding availability, suitability, price and trust can be addressed more quickly, cheaply and possibly more reliably, people have become more willing to engage share economy services rather than rely on the brands and reputation of major service providers such as big chain hotels and established taxi companies to serve them. Local governments, as regulators of business, whether through land use bylaw or business regulation bylaw, are consequently affected by pressure from the public and from businesses to update their bylaws to allow or to strictly regulate these new types of businesses.

III. LOCAL GOVERNMENT AUTHORITY TO REGULATE INTERNET-BASED BOOKING SERVICES

In seeking to regulate the share economy, one of the primary questions for local governments is the manner and extent that a board or council can regulate an Internet-based booking service. We use the term booking service because there is a significant question as to whether businesses like AirBnB and Uber do in fact broker or book deals. AirBnB and Uber often emphasize their removal from the offer and acceptance between the customer and the ultimate service provider-the host or the driver.

The question of whether Uber was a taxi-cab brokerage as defined by a business bylaw was raised in *Toronto (City) v. Uber Canada Inc.*² In that case, the City of Toronto sought an injunction against Uber Canada and its Netherlands-based parent company to restrain what Toronto said was Uber's operation of a taxi-cab brokerage or limousine service without a license. The Ontario Court dismissed Toronto's claim finding that Uber operates "as a super-charged directory assistance service". The Uber app conveys information between smartphones, which ultimately results in a match between a rider and a driver, a process in which Uber does not play an actual active role besides licensing the app to an end user.

Critically, the Court found that the limited activity of licensing the app was insufficient to come under the definition of a taxicab broker or limousine service company in the City's bylaws. Furthermore, the Court held that none of the ancillary aspects of Uber's business (e.g. recruiting drivers, marketing, billing, customer relations) is subject to a requirement to obtain a license. The brokerage aspects that Toronto regulated and licensed, essentially offering or accepting a service on behalf of a party, were found not to be the services that Uber provided.

A similar result occurred in *Edmonton (City) v. Uber Canada Inc.*³ with the Court finding that Uber's role, despite recruiting drivers and promoting its app, was not one that constituted a continuing breach of an Edmonton bylaw. The Court opined that the City may have named the wrong party, in that the individual drivers providing the taxi services were operating without the required licenses, but that the City had made minimal effort to enforce its bylaws against those persons.

² 2015 ONSC 3572

³ 2015 ABQB 214

While these cases illustrate a challenge in regulating internet-based booking services, it should not be presumed that such businesses are immune from regulation. Indeed in dismissing Toronto's claim, Dunphy J. said:

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.⁴

Just because the transactions of share economy businesses are booked using Internet driven software does not necessarily mean that the Internet-based aspects of the business will be immune to regulation.

How exactly foreign companies with international operations could and would be regulated by made in BC laws enforced by BC Courts is less clear. If customers and operators of share economy businesses conduct their Internet-based interactions using servers in California, is any of that deal happening in British Columbia? Does the business only begin to operate in British Columbia when the service is actually provided (i.e., the Uber driver picks the customer up)?

Two recent cases illustrate two sides of this tension. In *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 295 the BC Court of Appeal upheld an interlocutory injunction obtained in British Columbia that enjoined Google from displaying an industrial equipment vendor's website in worldwide search results, because the vendor had been accused of advertising goods that infringed the plaintiff's intellectual property rights. Google was obliged to obey the injunction, at least on an interim basis, despite its complaint that it could never be expected to provide a search engine that simultaneously complies with the local laws and judgments from around the world. At least in this case, the Court sought to ameliorate the harm a worldwide search engine service could cause to a British Columbia business.

In contrast, in *Douez v. Facebook, Inc.*⁵ the BC Court of Appeal stayed (permanently halted) a lower court proceeding in which the plaintiff sought to enforce the BC *Privacy Act* against Facebook because Facebook allegedly used "sponsored content" without her permission. First, the Court of Appeal found that the plaintiff would have to make her claim in a Californian court pursuant to an agreement by contract (acceptance of Facebook's terms and services). If that was not difficult enough, the plaintiff would have to ask the Californian court to enforce British Columbian law despite Facebook presumably arguing that all the impugned activity 'occurred' in California.

⁴ *Toronto (City) v. Uber Canada Inc.* at para 16

⁵ 2015 BCCA 279

The ability of local governments, and indeed the Province, to regulate and enforce regulations against international-based booking services will likely depend on how the jurisprudence on the regulation of the Internet evolves. However, an important consideration is determining what activities related to the share economy business are clearly located within the local government's boundaries and which ones are conducted abroad, even if those foreign activities are advertisements of or payments for services occurring within BC.

IV. IDENTIFYING REGULATORY OBJECTIVES

The rise of share economy businesses raises the question of whether 'pre-Internet' zoning and business bylaws adequately meet the interests of local governments. Some advocates call on governments to "level the playing field",⁶ meaning that share economy businesses and traditional businesses would abide by similar regulations. What those regulations should be, given the economic and social realities of share economy businesses, is a topic of hot debate. Two of the most popular share economy businesses, car share services such as Uber and short-term vacation rental businesses such as AirBnb, illustrate some questions regarding local government's potential regulatory purposes.

There is great variation in the nature and scope of local government's regulatory powers, so for convenience and brevity we will describe regulation of a share economy with regard to "quality control", "location" and "supply". We suggest that in most cases a public demand for regulatory change or enforcement regarding share economy businesses is driven either by a concern as to how safely and responsibly the business operates (quality control), where the business operates (location) or the number and size of such business operations (supply). Concerns about collection of tax revenues and licensing fees may also be a consideration, but that is a separate topic.

We will therefore review both Uber and AirBnB with those three primary concerns in mind.

A. Uber

Uber and other Internet-based car share services, including ride share apps, essentially offer a means by which a passenger pays a driver to give them a ride in the driver's car. Apps, however, make the transaction easier and enable the passenger to find more willing drivers for hire, drivers who need not advertise their service by driving yellow cars labelled as taxis. Given that more and more people want to be either passengers or drivers of this service that does not follow traditional taxi models, municipal councils are likely to be asked to consider regulations to address quality control, location and supply.

⁶ Alison Taylor, "AirBnB is not just a Whistler Problem" *Pique Magazine* October 30, 2015

1. Quality Control

Many businesses operate with almost no municipal quality control regulations, however taxicabs are typically one of the most thoroughly regulated businesses in Canada. In BC, taxis are subject to both provincial regulation under the *Passenger Transportation Act* and municipal bylaws. Such quality control requirements for taxi-cabs include rules, licensing requirements and vehicle safety inspection⁷ as administered by the Passenger Transportation Branch and Passenger Transportation Board. Municipal bylaws can supplement or overlap with Provincial regulations.⁸ Chauffeur permit requirements imposed by bylaw adopted under section 36 of the *Motor Vehicle Act* are a measure of scrutiny for drivers. The fixing of fares, whether by municipal bylaw or the Passenger Transportation Board, also affect how the taxi-cab business may serve its customers. These regulations preclude the operation of fly by night “jitney cabs” (nickel cabs) that were common-place in America in the 1920’s.

Now with the surge in rides being offered by car share services, these very similar businesses could also be subject to regulations if the municipal Council crafts bylaws that are directly applicable to their drivers. One issue that companies such as Uber raise is whether such regulation is actually required. Such businesses may argue that their own internal quality control measures are sufficient.

2. Location

Municipal governments have significant powers to control the location of business activities given that council has regulatory control over highways, public places and the use of private land. In the case of taxi and car services, Internet communication can erode much of the ‘locational’ advantage that taxis previously enjoyed through bylaws. Taxis and car services convey their passengers on the same highways, but typically taxis are the only businesses that are allowed by bylaw to be hailed by passengers on the street.⁹ Taxis can advertise their availability to prospective passengers by being brightly coloured and driving by with an illuminated taxi-sign. Car services, having previously had to rely on processing requests made by telephone to numbers advertised in the Yellow Pages, now offer apps that can provide quick and easy notification of available vehicles.

⁷ *Passenger Transportation Regulation*, B.C. Reg. 44/2015

⁸ In *Yellow Cab Co. v. Passenger Transportation Board*, 2014 BCCA 329 the Court of Appeal commented that: The Passenger Transportation Board and the City of Vancouver have, to some degree, overlapping jurisdiction in the licencing of taxis. In order to operate a taxi within the City, a person must comply with both the Passenger Transportation Act, and the Vehicles for Hire By-law. This is not an unusual situation. Many areas that may be regulated under municipal bylaws are also regulated by provincial or federal statutes. Where that is the case, both can subsist (assuming they were lawfully enacted), and will have force unless there is an actual conflict in operation between them: 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40. An actual operational conflict will only exist where it is impossible to comply with both the statute and the bylaw, such as where a bylaw prohibits activities that a statute requires.

⁹ See licensing requirements under *Passenger Transportation Act*, s. 23

Municipal bylaws may also provide for exclusive taxi stand locations, such as at airports or near popular night spots. While this might have traditionally provided a locational advantage for taxis over a private care service, the advantage is eroded when a passenger books a ride on an app while walking off the plane or out of a pub, rather than heading straight to the taxi rank to find a cab.

3. Supply

Regulation of the supply of taxis has arguably been the cornerstone of municipal taxi regulation. One of Canada's leading municipal law cases, *United Taxi Drivers Fellowship of Southern Alberta v Calgary (City)*¹⁰, confirmed that limiting the total supply of cabs through a licensing scheme was implicitly within a general municipal power to regulate businesses. In cases in which supply regulations have been challenged, Courts have expressly upheld municipal decisions to limit the number of licensed taxis for the purpose of increasing safety and improving driver welfare. For example:

The City was concerned that because of an excess of taxis there was a danger that in order to make a living drivers would operate for too many hours in a day and that they would be reluctant to remove their vehicles from business for proper servicing. That situation it was feared would create a safety hazard.¹¹

and

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.¹²

A significant tension between traditional taxis and newer ride share services is that the ride share services are operating (whether lawfully or not) without a regulatory cap on the number of vehicles or the fare that may be charged. How to respond to the difference in supply constraints is likely the most significant question before a municipal council faced with the "Uber" issue.

B. AirBnB and Short-term Vacation Rentals

"Short-term vacation rentals" is a common term used to describe the commercial practice of renting out houses, lofts and apartments for holiday or other non-residential purpose. Sites such as AirBnB are just a continuation of sites such as VRBO that connect potential guests with

¹⁰ 2004 SCC 19, [2004] 1 S.C.R. 485

¹¹ *Richard v Red Deer (City)* (1993), 8 Alta LR (3d) 345 (QB)

¹² *Toronto (City) v. Uber Canada Inc* at para 4

hosts. With AirBnB, hosts may sometimes offer nothing more than just a room or a bed in a residential dwelling, although hosts typically offer “whole house/apartment” rental. In some cases this rental occurs while the host is out-of-town, thereby allowing the host to make some money out of a dwelling that would otherwise be empty for a few days or weeks.

The offering of short-term vacation rentals ceases to be an incidental practice for a homeowner if the host regularly moves out to allow for short-term vacation renters to occupy the unit, or the host is an owner who does not actually live in the unit but continually rents it to short-term guests. The latter case is essentially commercial accommodation in a unit that was built to be a residence.

1. Quality Control

Municipal quality control regulation of short-term accommodation is far sparser than taxicab regulations. Even if there are not many business specific rules, the requirement that hotels have business licenses gives municipal councils a level of oversight even if the council does not impose too many specific rules. In *377050 BC Ltd. Dba the Inter-City Motel v. Burnaby (City of)*, 2007 BCCA 162 the British Columbia Court of Appeal confirmed that a council could cancel a business license in response to the bad management of the motel, in that case management who seemed unable to control or discourage criminal activity being committed by others at the motel. A council could similarly use its ability to suspend or cancel licenses as a check on short-term vacation rental businesses, assuming of course Council imposes a license requirement on them and businesses obtain the licenses required of them.

Fans of short term vacation rentals often praise how different their accommodation feels from a generic hotel. A selling point is often that the guest accommodation feels like a home. Whether a Council or Board should respond to this deviation from standard tourist accommodation by imposing more rules is a significant policy question. Municipalities have a statutory duty to regularly inspect hotels and motels for fire safety.¹³ Hotels and motels are built to different fire code standards than short-term vacation rental places that utilize buildings built as residential dwellings. Through the *Hotel Keepers Act*, hoteliers are also able to evict disruptive guests and engage police help if necessary to do so. This strengthens the commercial expectation that a hotel is expected to have management on site at all times to ensure that guest behaviour does not disturb neighbouring guests and property owners. With short-term vacation rentals, the neighbours are more likely to be residents and not in a position to call management in order to respond to disruptive guests.

2. Location

Where a local government will permit short-term vacation rentals to be located under its land use bylaws, if anywhere, is a question of policy. Location in this sense is not just regulation regarding the geographic location, but also the type of building, and its principal use. Land use bylaws, often in conjunction with business regulation bylaws, have been used to impose a

¹³ *Fire Services Act*, section 26

variety of regulations that effectively limit where short-term vacation rentals can be found. These can include limiting the type of dwelling that might be used as a short-term vacation rental, the amount of time within a year that such dwellings must be principally used as a residence, and whether they must be secondary to a principle or even ongoing simultaneous residential use.

Such locational requirements may be adopted to respond to the complaints of neighbours who object to the fact that dwellings in their residential neighbourhood or residential building are not being occupied by residents, but rather a series of transitory visitors, leading to a lack of community. There are also broader planning concerns based on the expectation that the local services, amenities and businesses that visitors frequent will differ from that used by residents.

3. Supply

A consequence of regulation of the location of short-term vacation rentals through land use bylaws is that it affects the supply of such services. If tourists are only housed in commercial zones and residents were only housed in residential zones, a Council or Board adjustment of the areas and density of these zones has more predictive effect on the availability of the two types of accommodation. If, however, a dwelling unit in a residential zone is permitted to switch at the owner's whim from a residential use to a tourist use and back again, the supply of such accommodation will vary in response to market forces. This variability in supply and demand will presumably create winners and losers; dwelling owners may benefit from a surge in short-term vacation rentals, while hoteliers and those seeking to rent residential accommodation may complain.

On the flip side, a large availability of short-term vacation rentals has been observed in some communities to reduce the availability of long term rental housing, and to significantly increase the cost of housing.

V. ENFORCEMENT

Regardless of how a council or board decides to regulate share economy businesses, enforcement action is likely to be more challenging than for most businesses. First, by its nature, share economy businesses are driven by people making their private goods or property available for commercial consumption and who do so in a manner that allows them to quickly switch back to private use. This can present a challenge for injunctive relief against an operator, since an injunction requires proof that the contravention is reasonably expected to continue. Where a private car becomes an Uber car for an afternoon than goes back to private use, an Uber driver can respond to an injunction by saying that they have stopped Uber-driving at very little cost. Building a case that the contravention is ongoing, particularly where the owner denies that ongoing use, can be difficult.

Calgary recently issued a "crackdown" on Uber drivers¹⁴, which involved enforcement staff issuing numerous tickets to drivers. Ticketing short-term vacation rental hosts may be difficult without the enforcement officer booking (and potentially having to pay for) a stay. A ticket or bylaw enforcement notice must specify the date of the alleged contravention, and evidence of advertising a service is rarely enough to establish a ticketable contravention. A resident's complaint about noise from the neighbouring dwelling and luggage-laden occupants who the resident has never seen before may have all the hallmarks of a short-term vacation rental, but the neighbours evidence may fall short of the evidence necessary for a conviction. Bylaw enforcement notices have a lower evidentiary standard (balance of probabilities) compared to municipal ticket informations (beyond a reasonable doubt) so that the former enforcement approach may be preferred.

In general, business licensing requirements and regulations are more amenable to enforcement than use or zoning restrictions, because actual use need not always be established if the business (driver or property owner) holds itself out through advertising as available. Business licensing also provides powers to suspend and impose terms. However, some level of permission is generally required before licensing is an available regulatory tool.

Rather than targeting local operators, local governments may prefer to target the internet booking services that help facilitate share economy services. The challenges facing the City of Toronto and the City of Edmonton in targeting Uber have been discussed earlier. An attempt by Saltspring Island to enjoin a local vacation rental management agency from "using" or "permitting the use" of residential property for short term vacation rentals was found by the BC Supreme Court to be generally beyond the scope of land use regulation.¹⁵ However, the potential that the operators were a "party" to an offence under the *Offence Act* was left open.

It is likely presumptuous to suggest that there could never be an effective regulation of Internet booking services. It is an open question whether the Province will respond to these issues by granting municipalities the authority to more clearly apply regulations directly to the Internet-based companies that facilitate share economy businesses, and whether the Court will be able to effectively enforce such powers.

VI. CONCLUSION

Whether the share economy is welcomed or targeted by a council, there is scope for regulation and enforcement. It is hard to see how the share economy will not compel updates to bylaws and enforcement practices unless the councils wish to simply allow these businesses to govern themselves as guided by market forces.

¹⁴ <http://www.cbc.ca/news/canada/calgary/uberx-calgary-enforcement-tickets-1.3297698>

¹⁵ *Saltspring Island Local Trust Committee v. Westcoast Vacations*, 2012 BCSC 1590

NOTES