

Regulator, What's Your Uber? (or When is a Duck not a Duck?)

by Richard Steinecke
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The effect of Uber on the regulation of the taxi industry is a lesson to all regulators. If a regulator does not remain sensitive to emerging trends, it can become irrelevant in a shockingly short period.

The regulation of the taxi industry protects the public in many important ways. Rude, abusive, dangerous or criminal drivers can be removed. Financial exploitation can be avoided. Insurance coverage can be ensured. Knowledge of local geography can be assured. Clean cabs can be encouraged. Accessible payment options can be mandated.

However, the regulation of the taxi industry has long been associated with abuses and even outright corruption. Journalist Peter Cheney's investigative series on the Toronto taxi industry in 1998 revealed how the plate ownership system exploits taxi drivers and put the public at risk: www.taxi-library.org/leas03.htm.

Cheney, in an updated article earlier this month said:

Which brings us to the present, and the arrival of Uber, the sword that will finally cut through the Gordian knot of misguided regulation that ensnares the Toronto cab business. (Globe and Mail, July 16, 2015)

As everyone knows, Uber became more commonplace in 2012 and now has global reach. Uber provides an "app" on electronic devices that

allows persons wanting a ride to be "matched" with nearby drivers offering rides. If the match is accepted, the driver picks up that person at an identified location. The cost of the ride is automatically deducted from the rider's credit card by Uber which reimburses the driver that amount, less a fee.

As Brian Ruddock has noted in his article "*What Uber Can Teach Us About American Government*" (www.linkedin.com/pulse), the Uber model has been hugely successful, rivalling the taxi industry in the number of rides provided in some cities. The result has been legal challenges by taxi regulators, with mixed success.

In *City of Toronto v Uber Canada Inc. et al.*, 2015 ONSC 3572 an attempt by the city to obtain an injunction against Uber was unsuccessful. In a very readable judgment, the Court was sympathetic to the Uber model and placed the responsibility for addressing any public interest concerns directly on government and the regulators:

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

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Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

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the differing opinions of the actors that our constitutional order demands.

The Court's reasoning in refusing the injunction included the following passage:

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.

The Court further said:

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.

As Ruddock points out, Uber is also winning the battle in the court of public opinion. Uber tends to come across in the media as a hip, tech-savvy “Robin Hood”. (Although some media reports on possible lack of insurance coverage and assaults by Uber drivers is causing some to rethink using the service.)

One has to wonder whether Uber's driver-screening and suspension system and customer service department might be faster and more effective than the existing, entrenched, municipal licensing regime. Could a global company, motivated by growing profits and wanting to rigorously and promptly protect its reputation, be as effective, or even more effective, in addressing concerns as a diverse group of public-interest regulators? Does the fear of negative media stories and on-line reviews adequately motivate an entity like Uber?

Or will Uber, once it becomes entrenched, be less responsive to customer concerns than existing regulators? Will an entity like Uber choose to ignore principles like transparency and procedural fairness that make regulators accountable to the public?

Lessons for regulators to learn from the ongoing Uber story include the following:

- Complacency by regulators makes them vulnerable to threats to their very survival. Regulators must be vigilant in identifying trends and forces (not always technological) that could replace them if they do not adapt.
- A key to the viability of a regulatory system is that its practitioners provide good customer service. Otherwise an alternative to the regulator will inevitably arise.
- The cost of regulation, passed on by practitioners to the public, can result in the public finding a substitute to regulated practitioners and ultimately the regulator itself.

The *Uber* case can be found at: <http://www.canlii.org>.