

- (a) an interlocutory *quia timet* injunction enjoining and restraining Surrey from fining, ticketing, or otherwise sanctioning Uber and Drivers (as defined below) for functioning in Surrey pending the disposition of this action or until further order of this Court; and
- (b) an order requiring Surrey to pay Uber's costs of this application.

PART 2: FACTUAL BASIS

- 2. On January 23, 2020, Uber received a licence to provide transportation network services within the Lower Mainland, including Surrey, under the *Passenger Transportation Act*.¹
- 3. Uber provides transportation network services by offering a digital network through which passengers can request transportation services from independent third-party transportation providers using their own vehicles ("**Drivers**").
- 4. In accordance with its *Passenger Transportation Act* licence, Uber started providing transportation network services in Surrey on January 24, 2020. Drivers began providing transportation services in Surrey on the same day.
- 5. At 4:44 p.m. on January 24, 2020, Robert Costanzo, Surrey's General Manager of Corporate Services, informed Uber that Surrey would fine Uber and Drivers if they continued to operate within Surrey without a business licence issued by Surrey. Mr. Costanzo sent the following email to Uber:

It has come to [Surrey's] attention that UBER has commenced transportation network services (TNS) in Surrey without obtaining authority from [Surrey]. Please be advised that the City of Surrey Council has not yet provided its official position on how it wishes to deal with TNS and that a decision in this regard will be made by late February/early March 2020. Until a decision is made by Surrey Council, UBER cannot operate within Surrey's municipal boundaries without a Surrey business licence. Should UBER not adhere to [Surrey's] requirements, you will face a \$500.00 fine per day against the UBER organization and a \$500.00 fine per vehicle offense.

UBER must inform its [Drivers] of [Surrey's] position including the repercussions should UBER not adhere to [Surrey's] requirements

¹ S.B.C. 2004, c. 39.

as provided above. UBER will be provided until 9:00 pm this evening to cease its service in Surrey.

6. As Mr. Costanzo acknowledged, there is no relevant business licence available from Surrey for which Uber could apply—even though Surrey has known for months that ride-sharing was coming to British Columbia. Surrey thus plans to impose fines for failing to obtain a business licence that does not exist.
7. Even if a licence were purportedly available, Doug McCallum, the Mayor of Surrey, has repeatedly told Uber and the public that Surrey will never issue a business licence to Uber. For example:
 - (a) In September 2019, Mayor McCallum said that (i) he “will not let ride-sharing come” to Surrey and (ii) Surrey “will not be issuing any business licences to ride-sharing companies”. He characterized this as a “tool in [Surrey’s] back pocket” to thwart ridesharing.
 - (b) On January 24, 2020, Mayor McCallum said that until “assured that a level playing field is established [between ridesharing and taxis], I will not be supporting the issuing of ride-hailing business licences”.
8. Since Mr. Constanzo’s email, Surrey by-law enforcement officers have issued warnings to several Drivers operating in Surrey. The warnings allege that they are violating s. 3 of Surrey’s *Business License By-law* No. 13680 by carrying on business without a business licence. The warnings neglect to mention that no relevant business licence is available.

PART 3: LEGAL BASIS

9. Uber relies on Rules 10-4(1) and (2) of the *Supreme Court Civil Rules* and s. 39(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 to seek a *quia timet* interlocutory injunction in advance of filing a notice of civil claim.
10. A *quia timet* injunction restrains and enjoins threatened wrongful acts before they occur. This Court should grant a *quia timet* injunction where:
 - (a) there is a high probability that if an injunction is not granted, the anticipated activity will occur imminently or in the near future;

- (b) there is a serious question as to whether the plaintiff has a right that would be breached by the activity; and
- (c) weighing the likelihood of irreparable harm to the plaintiff, the balance of convenience favours granting the injunction.²

11. All three conditions are met here. Surrey has admitted that it intends to fine Uber and Drivers in the near future because, Surrey maintains, Uber is prohibited from operating there. Surrey's plan is illegal: recent amendments to the *Motor Vehicle Act*³ and other legislation expressly prevent Surrey from prohibiting Uber's operation. If Surrey proceeds, Uber's success on the merits is all but inevitable. But compensating Uber and Drivers with damages after-the-fact would be impossible.

Absent the injunction, Surrey will fine Uber and Drivers

12. Via Mr. Costanzo's email, Surrey has admitted that it will fine Uber and Drivers in the near future. Drivers have already received warnings from Surrey's by-law enforcement officers.

Surrey has no right to ban Uber and thus no right to fine it for operating

13. Surrey's position is that Uber cannot operate in Surrey without a business licence. But Surrey does not offer any relevant licence for which Uber could even apply. According to Mr. Costanzo, such a licence will not exist for at least a month. According to Mayor McCallum, it may never exist. Thus Surrey purports to prohibit Uber from operating and threatens to fine it (and Drivers) for breaching Surrey's supposed prohibition. This is not only unfair, but also unlawful.
14. Surrey does not have the power to prohibit Uber and Drivers. To the contrary, the Legislature has expressly denied Surrey that power. The Legislature recently amended the *Motor Vehicle Act* and other legislation to prevent any one municipality from thwarting transportation network services.

² *XY, Inc. v. IND Lifetech, Inc.*, 2008 BCSC 1215 at para. 70.

³ R.S.B.C. 1996, c. 318.

15. Section 124.2(5) of the *Motor Vehicle Act* provides, following those amendments, that a municipality “must not ...
 - (a) regulate in relation to the number of passenger directed vehicles that may be operated under ... transportation network services authorizations, or
 - (b) prohibit vehicles referred to in paragraph (a) from operating in the municipality”.
16. Similarly, s. 36(12) of the *Motor Vehicle Act* provides, as amended, that a municipality “must not ... regulate in relation to chauffeurs who operate motor vehicles under passenger directed vehicle authorizations or transportation network services authorizations”.
17. Similar amendments to the *Local Government Act*⁴ and the *Community Charter*⁵ contain the same prohibitions.
18. These provisions ensure that Surrey cannot prohibit Uber, including by repeatedly fining Uber and Drivers for failing to obtain non-existent licences (or, as Mayor McCallum has promised, by refusing to issue licences even if they could be sought).
19. The restrictions on Surrey’s powers do not come as a surprise to Surrey. The British Columbia government has repeatedly told Surrey and the public that Surrey cannot prohibit ridesharing companies from operating. For example, on January 25, 2020, the government released the following public statement in apparent reaction to Surrey’s posture:

The *Passenger Transportation Act* provides sole authority to the [Passenger Transportation] Board to set boundaries/operating areas for taxis and ride sharing companies, therefore municipalities cannot have bylaws prohibiting ride-hailing operation. ... The absence of a bylaw or business license in specific municipalities related to ride hailing is not grounds for refusal of the service.
20. Uber has a licence from the Passenger Transportation Board. Surrey’s asserted prohibition and threatened fines would be illegal and breach the rights of Uber and Drivers.

⁴ R.S.B.C. 2015, c. 1., ss. 637.1-637.2.

⁵ S.B.C. 2003, c. 26, ss. 46.1-46.2.

21. Ultimately, for a *quia timet* injunction, there is a serious question to be tried if Uber is likely to succeed at trial.⁶ Given the Legislature's clear intent—as repeatedly confirmed by the provincial government—Surrey's brazen flouting of provincial laws renders its position untenable. Plainly put, Surrey's attempt to ban Uber comprises naked political grandstanding occurring with indifference to or even contempt of the rule of law. Uber's success on the merits is all but inevitable.

The balance of convenience favours Uber, which faces irreparable harm

22. When evaluating the balance of convenience, this Court must determine whether the harm to Uber from refusing the injunction would be greater than the harm to Surrey from granting the injunction. The factors this Court must consider include:

- (a) the adequacy of damages as a remedy to (i) Uber if the injunction is not granted and (ii) Surrey if the injunction is granted;
- (b) which party altered the *status quo*;
- (c) the public interest; and
- (d) the strength of Uber's case.⁷

23. Clear proof of irreparable harm is not required; doubt as to the adequacy of damages as a remedy suffices.⁸ In any event, irreparable harm exists where damages would be "extremely difficult to quantify".⁹

24. All of these factors support an injunction here.

- (a) If the injunction is refused and Uber prevails at trial, it will not be possible to compensate Uber for lost profits and market share caused by Surrey's illegal fines. Some Drivers (from whom Uber earns its income, by charging them service fees for use of Uber's technology) will not use Uber's service due to Surrey's threats. No one will be able to determine how many trips with Uber were lost. Uber will also

⁶ 526901 B.C. Ltd. v. Dairy Queen Canada Inc., 2018 BCSC 1092 at paras. 17-21.

⁷ Canadian Broadcasting Corp. v. CKPG Television Ltd., 1992 CanLII 560 (BCCA).

⁸ Ipsos S.A. v. Angus Reid, 2005 BCSC 1114 at para. 82.

⁹ Telus Communications Co v. Rogers Communications Inc., 2009 BCSC 1610 at para. 45, aff'd 2009 BCCA 581.

lose an opportunity to establish itself as one of the first two transportation network services licencees in the Lower Mainland. That lost first-mover advantage will be equally impossible to quantify. The only adequate remedy is a *quia timet* injunction.

Moreover, Uber will suffer unquantifiable reputational harm to the extent Surrey is allowed to continue its improper activities before a merits trial, especially since the matter is being heavily reported in the media. Uber's reputation as an entity that complies with regulatory obligations was given "considerable weight" by the Passenger Transportation Board in issuing Uber its licence:

[T]he Board placed considerable weight on the reports from other Canadian regulators confirming that it has complied with regulatory requirements. On balance, the Board accepts that Uber's more recent operations have been relatively trouble-free as confirmed by letters from the City of Ottawa in 2017, the Region of Waterloo in 2018, and the City of Mississauga in 2019. Uber has also provided copies of its licences from Lethbridge, Airdrie, Toronto, Brampton, Calgary, Edmonton, Guelph, Hamilton, London, Oakville, Ottawa, Regina, Saskatoon, St. Albert, Vaughan, Windsor, Whitby, the County of Wellington, and the Provinces of Saskatchewan and Québec. There is no evidence of a lack of compliance with regulatory requirements in those jurisdictions.¹⁰

Surrey's actions threaten Uber's hard-earned reputations with its regulators across Canada. If that threat is realized, Uber's losses will be impossible to quantify.

The impossibility of damages as a remedy will be compounded by Drivers. There will be no way to determine how much more money any given Drivers would have earned via Uber's platform in the absence of Surrey's illegal fines.

Conversely, if the injunction is granted but Uber's case fails, Surrey will not even suffer damages in the traditional sense—it will only forgo the illegal fines it plans to levy. Those fines are far more amenable to calculation than the lost profits and market share of Uber and Drivers.

- (b) Surrey is attempting to alter the *status quo*. As of January 24, 2020, Uber is licenced to provide, and was providing, transportation network services in Surrey. The British Columbia government has confirmed that Surrey cannot overrule the

¹⁰ Paragraph 48 of Uber's transportation network service licence issued by the Passenger Transportation Board.

Passenger Transportation Board and prohibit Uber from operating. Surrey is nevertheless purporting to do exactly that.

- (c) The public interest favours Uber. In approving Uber's licence on January 23, 2020, the Passenger Transportation Board determined that there was a public need for Uber's services. The public interest is better served by allowing a business that provincial regulators licensed for Surrey to continue operating in Surrey. Further, it would be against the public interest for Surrey to create a scenario where a transportation network service authorized for the entire Lower Mainland can operate in every part of the Lower Mainland except Surrey. That is exactly what the Legislature has sought to avoid.
- (d) As set out above, Uber's case is more than strong enough to satisfy the test for an injunction. Surrey's position is untenable given clear, express legislation to prevent exactly the problem Surrey is creating.

25. Uber undertakes to abide by any order this Court may make as to damages.

PART 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Michael van Hemmen made January 28, 2020.

The applicant estimates that the application will take two hours.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an Application Response in Form 33
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and

- (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).


PLAINTIFF'S ADDRESS FOR SERVICE:

Address for service: McCarthy Tétrault LLP
Barristers & Solicitors
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Attention: Michael Feder, Q.C.

Direct fax number
for service: N/A

E-mail address
for service: mfeder@mccarthy.ca

DATED: January 28, 2020


For MICHAEL FEDER, Q.C.
Counsel for Uber Canada Inc.

To be completed by the court only:

Order made

in the terms requested in paragraphs
of Part 1 of this Notice of Application

with the following variations and additional terms:

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DATED: _____ Signature of Judge
 Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts