

**REASONS FOR DECISION OF THE
ADMINISTRATIVE PENALTY TRIBUNAL**

Form 10

**Date of
Hearing:** 31/01/2018

**Hearing
Officer:** Paul Sommerville, Chair

Re: Car2Go Canada Ltd. ("the Company" or "the Owner")
See Appendix "B"

City's Representative: N/A

Owner's Representative: Mishka Nizar, duly appointed Agent

INTRODUCTION

This decision relates to the requests for review from the decisions of the Screening Officers pursuant to City of Toronto By-Law 610 for the 33 cases listed in Appendix B, attached hereto and forming part of this decision. The cases were heard by Hearing Officer and Chair Paul Sommerville on January 31, 2018.

For the purposes of the hearing and with the consent of the Company through its agent, these cases were consolidated. This means that the evidentiary component and the submissions supporting the Owners position, were common to and applied to each of the cases. The evidence consisted of sworn oral evidence and a series of Exhibits which are reproduced in Appendix A to this decision. Certain evidence presented in earlier cases which reflected the Company's membership numbers and the purported financial effect of the same was also incorporated by consent.

It can be seen from Appendix B that the individual cases represent a fairly broad range of parking offenses under various By-Laws of the City of Toronto.

These reviews have been undertaken pursuant to By-Law 610 the City of Toronto. That By-Law, which was enacted on July 7, 2017 and came into force on August 28, 2017, created the administrative penalty Tribunal and is the governing legislation for the Tribunal. The By-Law establishes specific criteria for the various aspects of the Tribunal's mandate. The Tribunal's mandate is limited to a review of Screening Officer decisions made with respect to Parking Violation Notices. Under this process, which is a fundamental departure from the previous Provincial Offenses based process, Owners are given an opportunity to have a Screening Officer consider the appropriateness of the Parking Violation Notice per se, as well as the amount of penalty associated with the Parking Violation Notice.

Once the Screening Officer has made his or her decision the Owner is given a further opportunity for a review by this Tribunal, whose mandate consists of authority to cancel, vary, or confirm the Screening Officers decision. The Tribunal's review is triggered by a Request for Hearing form being filed within the times specified in the By-Law.

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Our review is governed by section 4 of the By-Law. For the purposes of the hearings which are the subject of this decision the relevant portion of the By-Law is Subsection 4 (3), which describes the criteria under which the administrative penalty Tribunal can vary the decision of the Screening Officer as to the amount of penalty associated with any particular Parking Violation Notice. It reads:

4. On a review of a screening decision, the hearing officer may:

1. (1) affirm the screening decision;
2. (2) cancel the screening decision, if the recipient establishes on the balance of probabilities that the vehicle was not parked, standing or stopped contrary to the designated by-law provision as described in the penalty notice;
3. (3) vary the screening decision by:
 1. (a) cancelling the administrative penalty, administrative fees, or both if the recipient establishes on the balance of probabilities the existence of undue hardship;
 2. (b) varying the administrative penalty, administrative fees, or both if the recipient establishes on the balance of probabilities the existence of undue hardship;

The term “**Undue Hardship**” is defined in the By-Law as follows:

UNDUE HARDSHIP - circumstances in which payment of administrative penalties and/or administrative fees would cause undue hardship for purposes of O. Reg. 611/06 and contains the following two classes of circumstances:

1. (1) extenuating circumstances; and
2. (2) financial hardship.

The terms “**extenuating circumstances**” and “**financial hardship**” are defined as follows:

EXTENUATING CIRCUMSTANCES - a special or specified circumstance, including such types of extenuating circumstances established by the City Solicitor that partially or fully exempts a person from performance of a legal obligation so as to avoid an unreasonable or disproportionate burden or obstacle.

FINANCIAL HARDSHIP - a significant difficulty or expense and focuses on the resources and circumstances of the person owing an administrative penalty, including administrative fees, in relationship to the cost or difficulty of paying the administrative penalty or any administrative fees.

Accordingly, the Tribunal's authority to vary the penalties associated with Parking Violation Notices is limited to cases where it makes a finding that “undue hardship” has been established on the balance of probabilities. In order to vary the penalties that have

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been imposed on the Owner in these cases, and confirmed by the Screening Officer, the Tribunal must make a finding that the Company is subject to financial hardship if it is required to pay the amount confirmed by the Screening Officer, or that there are extenuating circumstances which make payment of that penalty unreasonable or disproportionate.

SCREENING OFFICER'S DECISION

All PVNs in appendix B were affirmed by the screening office with 30 days to pay.

CITY REPRESENTATIVE'S EVIDENCE

N/A

RECIPIENT'S EVIDENCE

Oral evidence, and the Exhibits reflected in Appendix B, as described in reasons.

CITY REPRESENTATIVE'S SUBMISSIONS

N/A

RECIPIENT'S SUBMISSIONS

Pursuant to the By-Law the Company has the burden of persuasion to convince the Tribunal on the balance of probabilities that it will experience Undue Hardship if it is required to absorb the liability associated with the parking violations to which it is subject.

It is important to note that at no time did the Owner dispute that the offenses reflected on the Parking Violation Notices had actually occurred. Indeed no evidence of any kind was led in an attempt to convince the Tribunal that the vehicles did not belong to the Owner, or that the vehicles were not parked in contravention of the prevailing By-Law requirements.

The sole focus of the Owner's evidence and submission was to attempt to convince the Tribunal to vary the amount of the respective penalties associated with these violations.

At the time of writing the Company has more than 2100 distinct Parking Violation Notices issued under the Administrative Penalty regime, representing hundreds of thousands of dollars in penalty liability. The Company's operations generate something in excess of \$100,000 per month in penalties and the number of Parking Violations continues to increase each and every day.

Members, that is customers, typically rent cars for short periods and at the end of the rental contract period leave the vehicles to be picked up by the Company or accessed by

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subsequent rental customers. These Violation Notices are generated as the result of the Company's customers parking or leaving the Company's vehicles in locations at times, or both, that are prohibited by prevailing By-Laws regulating parking in Toronto, or become so with the passage of time.

The Company's position is that the cumulative amount of penalties associated with the very large number of Parking Violation Notices represents a material threat to the Company's viability. In its requests for hearing the Company suggests that the viability of the Company is at risk if it is required to pay the full amount of the penalties associated with the Parking Violation Notices.

The Company operates a short-term car rental business. It appears to be a member of the Daimler Corporation corporate family, headquartered in Germany. For the purposes of this decision, the Tribunal is not concerned with the financial position of the parent Company, but only the Toronto franchise, Car2Go Canada Ltd.

DECISION

A review of the evidence demonstrates that it is part of the Company's business model and commercial strategy that users of its service do not have to pay for most parking violations that may be incurred during their rental period or as a result of it. In short, the Company does not seek reimbursement from its customers for the substantial majority of parking violations however they are incurred. In its Requests for Hearing the Company states:

"We do not charge customers for permit parking. We only charge customers for rush hour and fire route parking"

Exhibit 3 of the evidence, which is signed by the Regional Director and General Manager of the Company stipulates that the Company:

"fully absorbs the cost of and does not transfer charges to members for permit parking tickets including but not limited to:

- parking in permit parking location
- parking in excess of permitted time
- parking longer than 3 hours
- park prohibited time no permit
- park during prohibited times.

The same Exhibit stipulates that customers will be charged for tickets relating to fire zones, accessibility zones, fire hydrants or rush hour violations (emphasis added).

As a result, the Company itself bears ultimate responsibility for a large percentage (86% during one period, according to Exhibit 4) of the parking violations generated by its operations. It is this burden that forms the basis for the Company's submissions in these cases that it faces undue hardship in paying the penalties associated with the subject Parking Violation Notices.

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The fundamental problem with the Owner's position as it relates to the financial hardship component of the undue hardship criteria is that it has declined to provide financial information that would put the liability associated with the Parking Violation Notices in an appropriate relation to the Company's financial position.

It is clear that there is a very large number of parking violations. It is also clear that there is a substantial liability associated with those parking violations. But what the Company has failed to demonstrate through evidence is the impact of the liability associated for the financial health of the Company. Pursuant to the By-Law financial hardship "focuses on the resources and circumstances of the person owing an administrative penalty....in relationship to the cost or difficulty of paying the administrative penalty or any administrative fees."

Without evidence to substantiate the Company's financial position as a whole it is impossible for the Tribunal to come to any conclusion with respect to financial hardship resulting from the Parking Violation Notices in these cases.

In the course of the hearings dealing with the Company's violations the Tribunal repeatedly invited the Company to provide evidence putting the amount of the associated liability in context with the Company's overall financial position. The Tribunal indicated that it would receive any such commercially sensitive information on a confidential basis and that if the information met reasonable criteria respecting confidentiality that it would not form part of any public record. The Tribunal also indicated that if information submitted by the Company on this question did not meet reasonable confidentiality criteria, such information would not be considered by the Tribunal, would be returned to the Company and would not form part of the public record. The Company has consistently declined to provide such information.

What may be financial hardship for one person or commercial enterprise may be irrelevant to the financial health of another. The only way to make that assessment is with a more complete financial picture than the Owner was prepared to provide in these cases.

This is particularly germane in a situation where it appears as though part of the Company's business model and commercial strategy includes offering customers freedom from liability from parking violations incurred during their rental contracts or as a result of them. It is not unreasonable to conclude that this feature is attractive to customers and potentially results in increased revenue for the Company. Accordingly, it is conceivable that any liability associated with the Parking Violation Notices may be offset by increased sales. Based on the evidence provided by the Company in the hearing, the Tribunal is simply unable to draw any conclusions respecting the implication of the liabilities associated with the Parking Violation Notices for the Company. The Company has failed to convince the Tribunal on the balance of probabilities that the Company falls within the financial hardship component of the undue hardship criteria established by the By-Law.

For similar reasons the Company has failed to convince the Tribunal that the extenuating circumstance component of the undue hardship test has been met.

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The evidence in these cases shows that it is an integral part of the business model of the Company not to seek reimbursement from its customers for most parking tickets associated with the rental contracts. Customers who have been encouraged to use the services of Car2Go may well be doing so on the basis of an inducement that a substantial category of parking violations will not be subject to reimbursement by the customer. This may have the effect of virtually incentivizing parking violation by customers of the Company.

This has important implications for the application of the extenuating circumstances component of the undue hardship test. The Tribunal finds that In order to succeed pursuant to the “extenuating circumstances” component of the undue hardship criteria the extenuating circumstance must be beyond the control of the Owner and certainly not of its own devising. So far from being beyond the control of the Owner, the decision not to seek reimbursement from customers for numerous categories of parking violations forms an integral part of its operation.

In this way the number of violations and the cumulative amount of penalties associated with them is a conscious business policy and effectively, a self-inflicted wound.

Perhaps of even greater concern is the fact that through its business model and its customers' actions, the Company is responsible for a very large number of violations of parking regulations, a process that continues day after day.

Parking regulation plays an important role in the quality of life of the city. Parking violations compromise safety and the orderly flow of traffic throughout the city. It plays an important part in the ongoing enjoyment of the amenities of the city by its citizens, on thoroughfares and residential streets alike. The Company's business policy with respect to the generation of parking violations is a self-serving strategy that could be seen to place the interests of the Company and its customers in competition with those of others.

Accordingly, the Tribunal finds that the Company has failed to convince the Tribunal on the balance of probabilities that imposition of the penalties associated with the subject Parking Violation Notices is an unreasonable or disproportionate burden.

For these reasons the Tribunal finds that the Company has failed to convince the Tribunal on the balance of probabilities that it is subject to undue hardship. The penalties associated with the subject Parking Violation Notices and confirmed by the Screening Officers are therefore affirmed as of the date of this decision. Given the circumstances, the Company will be allowed 90 days to pay the penalties affirmed by this decision

AFTERWORD

Early on in the process of scheduling the large number of cases initiated by the Company, in my capacity as chair of the Tribunal I wrote to the Owner suggesting that given the high degree of commonality among the cases the consolidation of all of the cases would seem to be appropriate. Given that the Company was not disputing on a case-by-case basis that the parking violation had in fact occurred and that the only issues appeared to be related to undue hardship and variance of the penalty amounts this seemed to be a cost-effective approach to managing the volume of cases.

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The Owner rejected that suggestion, as it was entitled to do, and insisted that the cases, all 2100, be dealt with individually.

This position however is not consistent with the fundamental thrust of the Company's evidence and submissions. In all of its submissions the Company, through its agent, asserted that it was the cumulative effect of the very large number of tickets that gave rise to its concern.

As matters progressed it became clear that the evidence and submissions associated with each of the cases were substantially identical.

The position of the Owner evolved as cases came to be considered on a day-to-day basis, with a consolidation of daily dockets. The evidence and submissions from each of the cases was, as I indicated earlier, incorporated into the consolidated blocks of cases. The cases subject to this decision were heard in this fashion.

It is also important to note that in its submissions the Company indicated that it was engaged in a process with officials of the City of Toronto directed to finding what the Company refers to as a "global resolution" of the parking ticket issue. This initiative involves seeking some form of exemption from parking regulations, during a pilot project.

This is a political process that at the time of writing has not resulted in action by the City so as to provide the exemptions sought by the Company. This political process as we understand it continues, but it could not and has not formed any part of the Tribunal's consideration of the Parking Violation Notices currently outstanding against the Company.

Originally Signed

Paul Sommerville

Chair

Date Signed: 12/02/2018

Attached:

Appendix A – Exhibits 1 through 6

Appendix B – Car2Go Canada Ltd Parking Violation Notices heard on January 31, 2018

Infraction Code Descriptions

- 2 Park longer than 3 hours
- 5 Park highway prohibited times
- 6 Park highway over permitted time
- 29 Park prohibited time – no permit