

Citation: *R. v. Pumphrey*, 2013 YKTC 68

Date: 20130716
Docket: 12-07426
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

RONALD PUMPHREY

Appearances:

Nora Mooney
Ronald Pumphrey

Counsel for the City of Whitehorse
Appearing on his own behalf

REASONS FOR JUDGMENT

[1] COZENS C.J.T.C. (Oral): Ronald Pumphrey has been charged with having committed two offences contrary to the City of Whitehorse Vehicle for Hire Bylaw, 2011-32 (the "Bylaw"). The first offence is for having used a vehicle for hire without a licence, contrary to s. 31 of the Bylaw, and the second is for failing to keep his vehicle for hire in a state of repair which is free from any deficiency, contrary to s. 80 of the Bylaw.

[2] A motor vehicle for hire is defined in s. 3 of the Bylaw as:

... a vehicle that is drawn otherwise than by muscular power, used for the carrying, transporting or conveyance of persons or property for hire and, without limiting the generality of the foregoing, shall include any motor vehicle equipped with a taximeter which is used for the transportation of

passengers for a metered fare, whether or not the vehicle has been inspected and/or licenced under this bylaw.

[3] Sections 31 and 80 of the Bylaw read as follows:

31. No vehicle for hire may be used for hire unless it has a vehicle for licence, which shall be annually renewed, affixed to the vehicle, and which is not transferable to any other vehicle except upon surrendering the license to Bylaw Services for redistribution and paying the fee.

...

80. The owner or driver of a motor vehicle for hire shall keep such vehicle in a state of repair which is free from any deficiency, including but not limited to, body damage, interior damage or disrepair.

[4] In September 2012, Bylaw Officer Bonnie Howell followed up on a complaint that Mr. Pumphrey's vehicle for hire, a four door PT Cruiser (the "Vehicle"), had a broken rear window. During her investigation, Officer Howell discovered that the Vehicle was registered to Mr. Pumphrey and another individual, as well as in the business name of "And Or At Your Service".

[5] Officer Howell located the Vehicle at Mr. Pumphrey's residence and observed that the rear window was broken and that a temporary plastic rear window had been taped into its place. On September 27, 2012, Officer Howell issued Mr. Pumphrey a warning that the Vehicle needed to be repaired by October 3, 2012. This date was suggested by Mr. Pumphrey as he indicated he was going to change his business.

[6] On October 2, 2012, Mr. Pumphrey left Officer Howell a voicemail indicating that he was no longer a taxi driver and that he had turned in his vehicle for hire licence plate to Bylaw Services, and had changed his business licence to an escort service.

[7] Officer Howell confirmed that Mr. Pumphrey had in fact turned in the licence plate as stated and that he had obtained a business licence to operate "At Your Service Assisted Living and Companion Service". The business licence for "And Or At Your Service" remained valid.

[8] Officer Howell subsequently followed up on reports she received that Mr. Pumphrey was observed picking up passengers in town, in particular, at the 98 Hotel, and that the window of the Vehicle was still broken. Officer Howell located the Vehicle on October 10, 2012, and noted that, in addition to the still-broken window, there was still a meter in the Vehicle with a meter seal attached. The vehicle for hire driving permit was still affixed to the dashboard, however, the roof light no longer said "Taxicab".

[9] At Officer Howell's request, Mr. Pumphrey attended at Bylaw Services where he provided a warned statement and answered some questions. There was no dispute as to the statement or the answers he provided being voluntary or that the statement was taken in compliance with *Charter* requirements.

[10] Mr. Pumphrey stated that he was not transporting persons or goods for a fee and that he was not operating a vehicle for hire. The individuals he was transporting were paying him for his time, not for transportation. Any transportation is incidental and free.

[11] Mr. Pumphrey advised Officer Howell that he had kept the meter and roof light in case he returned to operating a vehicle for hire or sold the Vehicle.

[12] Sometime in November 2012, Bylaw Officer Jason Westover was asked by his supervisor at Bylaw Services to contact At Your Service Assisted Living and Companion Service. He was provided a phone number by a senior officer. Officer Westover called this number and made arrangements for Mr. Pumphrey to pick him up at the Whitehorse Airport. Mr. Pumphrey attended at the airport in the Vehicle. Officer Westover put his bag in the Vehicle, sat in the rear seat, and asked to go a destination in Porter Creek.

[13] Mr. Pumphrey immediately advised him that he was not operating a taxi but an escort service, that he would be paying Mr. Pumphrey for his companionship and time, and that he would be charging a flat rate of \$20.00 payable at the destination. Mr. Pumphrey repeated this during the drive.

[14] Officer Westover stated that nothing seemed out of the ordinary. He did not observe a meter, but stated that if there was one in the Vehicle it was not on.

[15] Upon arriving at the destination, Officer Westover paid Mr. Pumphrey and received a business card. This card referred to "Capt'n Ron At Your Service" with the phone number of 332-TAXI (8294).

[16] Subsequently, another Bylaw Officer, Officer Louis-Charles Martel was similarly asked to contact Mr. Pumphrey and arrange for a ride. On December 3, 2012, Officer Martel called Mr. Pumphrey from the Canada Games Centre and asked for a taxi or a cab. Officer Martel was asked where he was and where he was going. He was told by Mr. Pumphrey that he had another Granger passenger with him and that he would be there shortly to pick him up.

[17] Mr. Pumphrey arrived in the Vehicle approximately five minutes later. Officer Martel stated that the inside of the Vehicle looked like he would expect a taxicab to look. When he was seated in the Vehicle, Mr. Pumphrey asked Officer Martel if he was new to Mr. Pumphrey's service. Officer Martel told Mr. Pumphrey that he had never seen him before. Mr. Pumphrey then advised Officer Martel that he used to be a taxi driver but that he was not one anymore, providing as an explanation that the City required taxi drivers to use a dispatcher and that he did not have one; therefore, he had surrendered his permit. He then told Officer Martel that he would not be paying Mr. Pumphrey for a ride, but for his companionship, i.e., his company and conversation. Mr. Pumphrey stated that the transport to a destination was incidental.

[18] Officer Martel asked Mr. Pumphrey whether he would still get to his destination and Mr. Pumphrey told him that he would. Mr. Pumphrey told him that the ride would be cheaper and he charged him \$10.00. After arriving at his destination, Officer Martel paid the \$10.00 and added a one or two dollar tip. He then asked Mr. Pumphrey for a receipt. He received one, filed as Exhibit 11 in these proceedings. I note that the receipt again reads "Capt'n Ron, At Your Service" with a phone number of 332-TAXI (8294). The back of the card has a top line which reads "Receipt For Your Journey" and noted that the \$10.00 had been paid by Officer Martel.

[19] Officer Martel agreed in cross-examination that Mr. Pumphrey was engaged in conversation with the other passenger. Mr. Pumphrey attempted to engage Officer Martel in conversation but without success.

[20] Mr. Pumphrey testified in his own defence. He said that when he was operating as a taxi driver he built up a clientele. He stated that this clientele wanted him as a driver and not just any taxi.

[21] He testified that he could not afford to operate under the new Bylaw requirements that involved the mandatory use of a dispatcher. He also stated that it was unsafe for him to use a radio and also drive the vehicle, which was a stick shift. He stated that he decided to open a new business in which people would pay him for his companionship and his time. He would let them know that he was not a taxi and that if they chose to use his service as a transportation means and pay for his companionship in doing so, that would not be a problem. He believes that this business provides such a service and his clientele know that they will be transported where they want to go safely. Mr. Pumphrey states that some of his clientele were afraid of travelling in taxis but that they trusted him.

[22] Mr. Pumphrey provided examples of the service he provides as follows: he assists one client with getting his mail, paying his bills, and getting him into his house. He stated that he goes to this individual's residence to check on him if he does not see him for a day or two. Mr. Pumphrey also assisted this client by cajoling him into seeking compensation for his time attending at residential school. He testified that this individual calls him a friend. Mr. Pumphrey stated that he has a client with a bad back and that he has keys to this client's apartment building so that he can go in and help him. I believe that it was this client that Mr. Pumphrey stated had a broken window that he fixed, although it may have been another client that he was referring to. Mr. Pumphrey stated that he had a client who had foot surgery. Mr. Pumphrey stated that this client would

call him and that he would carry him back into his doorway. He helped a line painter client load and unload his van. Mr. Pumphrey would allow his clients credit, as well as loaning some of his clients who were on social assistance money that they would pay back to him when they received their cheques.

[23] Mr. Pumphrey would often enter the 98 Hotel and have conversations with people. Many of these people came to him when they needed his assistance. He often sits on people's steps and talks with them. He has many of his client's phone numbers. On the day of trial, Mr. Pumphrey was keeping a client's backpack safe in the Vehicle and that he had made arrangements to return this backpack to the client at 5:00 p.m. that day. Mr. Pumphrey states that he picks up at least one hitchhiker a day in order to "pay it forward" and that he does a lot of things for free.

[24] Mr. Pumphrey testified that it was his intent to improve people's spiritual state by the time that they left his Vehicle. He said that he operates as a service centre where clients can enter the Vehicle and receive advice, assistance with shopping and counselling, and the word "journey" could also mean a spiritual or emotional journey that he was taking them on.

[25] Mr. Pumphrey stated that he operates by word of mouth and that his phone number is not advertised anywhere. He relies on his clients to pass on information regarding his business.

[26] Mr. Pumphrey states that he makes less money than he would if he was a taxi driver. He said that a lot of companies transport persons or goods for a fare, such as pizza delivery vehicles, tour companies, and certain outfitting companies. He stated

that he called one taxi company's number since the Bylaw amendments came into effect and was connected directly to the driver and not to a dispatcher, and that he advised Bylaw Services of this.

[27] Mr. Pumphrey testified that he thought Officer Martel was a regular client of his that was giving him a hard time by pretending that he had not seen him before.

[28] In cross-examination, Mr. Pumphrey agreed that he would get calls from customers asking him to give them a ride and that his number at the time of the offences with which he had been charged was still 332-TAXI. He agreed that the Vehicle at the time had taxi decals on it, as well as Interact and Visa references. He agreed that he gave Officer Martel a ride from the Canada Games Centre to Main Street, and that he charged him \$10.00 as partial payment for his time. Mr. Pumphrey stated that the business cards that he hands out as receipts are left over from when he was a taxi driver.

[29] I note that Mr. Pumphrey stated that he operated in the same manner even when he was a taxi driver. He testified that he has always liked to help people. I also note that the Vehicle still had the phone number on its side at the time of these charges and that the business cards he handed out as receipts if asked to provide one, had his phone number on them. I note that there is no evidence from any of the clientele that Mr. Pumphrey's clients pay him for his companionship and no evidence that they actually pay him for his companionship other than when they are being transported to a destination in the vehicle. I note that Mr. Pumphrey testified that when he operated as a taxi he would drive clients to detox instead of to buy crack and that he transported

approximately half a dozen such individuals to detox without charging them. I note that in a statement dated October 12, 2012 to Officer Howell, Mr. Pumphrey was asked whether he spent time at people's residences. He responded that "No, my office is in my car, but sometimes, most is in my car." He stated that he charged people by the minute for his time and companionship.

CASE LAW

[30] In *Hay River (Town) v. Robinson*, [1997] N.W.T.J. No. 36, the Court was adjudicating upon a situation where three respondents had been or had attempted to become involved in the taxi service. They were offering rides to the public in exchange for a voluntary donation to a fund to be used to litigate against the Town in a proposed challenge to the Bylaw regulating taxis. The issue was framed as whether these activities of the respondents contravened the Taxi Licence Bylaw. The Court ruled that they were not. The Court stated the following in paras. 15 to 19:

Counsel provided a number of dictionary definitions of the terms "hire" and "profit". From reviewing those, it appears to me that the term "hire" usually involves payment or compensation that is contracted to be made for the use of something or for personal service.

The case authorities bear this out. In *Bonham v. Zurich General Accident & Liability Insurance Company Limited*, [1945] 1 K.B. 292 (C.A.), the Court considered the meaning of the words "hire or reward" in connection with the carriage of passengers. The driver in that case accepted, but did not request, the equivalent rail fare from fellow employees he drove to work. Two of the three Judges on appeal held that the passengers were carried for reward. All three Judges considered that the word "hire" imported an obligation to pay, which was not present in that case.

In this case, passengers who accept or request a ride from the Respondents have no obligation to pay anything. They are asked to make a donation to a cause, albeit a cause perhaps dear to the hearts of the Respondents alone. The Respondents do not demand any particular sum

of money and have no recourse should the passenger decline to make a donation.

This situation is quite different, in my view, from the case where a driver makes an arrangement to carry passengers for the same amount they would otherwise have to pay a taxi. That was the situation in *Semon v. Canada West Insurance Company* (1951), 3 W.W.R. (N.S.) 45 (Alta. S.C.). The Court found that the driver was carrying passengers for hire, relying on the following definition of "hire" from the New Century Dictionary:

"The price or compensation to be paid or contracted to be paid for the temporary use of something or for personal services or labour (as, money paid as boat-hire or carriage-hire; 'The labourer is worthy of his hire', Luke, x. 7); hence, reward or compensation in general."

The Respondents do not get any compensation for their labour or the use of the vehicles; they may, or may not, get a donation to the litigation fund.

[31] Also in para. 22 of the decision, the Court stated, citing from the *Hood v.*

McKarney Cooperative Insurance Services Ltd. (Third Party), [1977] 11 Nfld. & P.E.I.R. 193, that:

... The words "for hire" carry with them the understanding that the insured would use the vehicle on a commercial basis as a means of earning income, such as are clearly contemplated by the words immediately preceding the phrase "or for carrying passengers for compensation or hire". Those words are "the automobile is used as a taxi cab, public omnibus, livery, jitney or sightseeing conveyance." The whole tenor of the section is and a prohibition of the use of the vehicle as a commercial enterprise. In my opinion, the words "for compensation" should bear the same meaning as the words "for hire" when construing the meaning of this Clause of the policy.

[32] It is clear to me that Mr. Pumphrey wants to provide his clients more than simply a ride from one place to another. He enjoys engaging his clients in conversation and providing them whatever assistance that he can. I believe that Mr. Pumphrey, in all

likelihood, provides his clients with a safe ride to their destination. He clearly appears to like people and to be a personable and gregarious individual. In that regard, to some extent, his actions and his business operation could be considered laudable and it brings to my mind the Harry Chapin song "Taxi", where sometimes more can happen than just a ride from point A to point B. It is also clear to me that Mr. Pumphrey does not approve of the Bylaw amendments. He has provided examples that he states show problems with the scope of the application of the Bylaw or the enforcement of it. To some extent, I expect that he feels that he has been unfairly singled out for prosecution for allegedly contravening the Bylaw.

[33] I am not faced with a constitutional challenge to the validity of the Bylaw. It is not for me here to pass judgment on the perceived merits or failures of the Bylaw, and I decline to do so. I must decide whether Mr. Pumphrey has committed an offence under the provisions of the Bylaw as he has been charged.

[34] The question I need to address is: Is Mr. Pumphrey operating a vehicle for hire?

[35] What comes to my mind is what is often colloquially referred to as the "Duck Test". The following excerpt from Wikipedia (which I am not, by the way, holding out as a trusted and reliable legal authority) sums up this test as follows:

The duck test is a [humourous] term for a form of inductive reasoning. This is its usual expression:

"If it looks like a duck, swims like a duck, and quacks like a duck,
then it probably is a duck."

The test implies that a person can identify an unknown subject by observing that subject's habitual characteristics. It is sometimes used to counter abstruse arguments that something is not what it appears to be.

I note that the original phrase has been attributed to James Whitcomb Riley and reads slightly differently, as do other versions of it. I believe that Mr. Riley's original statement was, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."

[36] It is apparent to me that Mr. Pumphrey has not substantially altered how he conducts his business. I find that he is essentially doing what he did while he was a taxi driver and that is providing individuals not only a ride to where they wanted to go, but engaging them in conversation, providing advice where wanted, and providing other assistance as required.

[37] It is clear that the two Officers called and wanted a ride for which they expected to pay a fee. What they received was a ride from point A to B for which they paid a fixed price. Indeed, there was scant evidence to suggest that anyone calling Mr. Pumphrey's number would do so other than for a ride. The offer of companionship occurs only after they were in the Vehicle, and nobody gave evidence to support Mr. Pumphrey's assertion that he is often called to provide general assistance and support, for which a fee is paid. In order to raise a reasonable doubt, I would need a more compelling body of evidence that the primary purpose of the service was something other than transportation. While I appreciate the ingenuity of Mr. Pumphrey's efforts to circumvent the application of the Bylaw, I am satisfied that he was operating a vehicle for hire in contravention of the Bylaw. I am also satisfied that the Vehicle was not in a state of repair, free from any deficiency, as it continued to have a missing window that had been temporarily repaired.

[38] I do not consider the evidence of Mr. Pumphrey to have raised a reasonable doubt in this regard. In fact, it is unclear to me whether all of the services that Mr. Pumphrey states that he provided to clients were provided only since the Bylaw amendments came into effect. In any event, I would be surprised that this was the case, given the evidence of Mr. Pumphrey and his manner of doing business.

[39] It is also unclear to me whether these clients paid for all of these services and what the basis for any such fee calculation would have been. I have no evidence from any other individual in this regard to clarify the issue.

[40] Therefore, I find that Mr. Pumphrey is guilty as charged on both counts.

Disposition?

[41] MS. MOONEY: Your Honour, the City is seeking a \$100.00 fine on the s. 80 offence and a \$250.00 fine on the s. 31.

[42] THE COURT: Is that the standard amount or is this a --

[43] MS. MOONEY: Yes, that's the standard amount.

[DISCUSSION RE FINE AMOUNTS FOR SECTION OFFENCES]

[44] THE COURT: Mr. Pumphrey, any submissions on an appropriate sentence? Those are the ticket amounts, correct?

[45] THE ACCUSED: I believe it states under the Bylaw as well that those fines would be attached to the licence.

[46] THE COURT: Which means?

[47] THE ACCUSED: For a licence renewal. That's in the Bylaw.

[48] THE COURT: Are you saying that you do not have to pay those fines unless you attempt to renew a licence? Is that what you are saying?

[49] THE ACCUSED: I believe that's in the Bylaw that the fines would be attached to the licence for renewal. I don't have a copy of the Bylaw in front of me.

[50] THE COURT: Well, I have a Vehicle for Hire Bylaw here and it says that a s. 31 offence is a \$250.00 fine, and that the s. 80 offence is a \$100.00 fine. I believe that what Mr. Pumphrey is saying is that he does not have to pay this money; it just attaches if he intends to renew a licence. Is that correct?

[51] THE ACCUSED: I believe that's right in the Bylaw.

[52] THE COURT: Well, I believe that is what you are saying, first.

[53] THE ACCUSED: Yes, Your Honour.

[54] THE COURT: And you are saying it is supported by the Bylaw.

[55] THE ACCUSED: Yes, Your Honour.

[56] THE COURT: What I read in s. 119 of the Bylaw is, "Where fees or fines remain unpaid", which would seem to imply an obligation to pay, "the City of Whitehorse may attach such fees or fines to the owner's or driver's vehicle for hire licence, or vehicle for hire permit" So I think that gives the City discretion. The fine is payable. In the event you do not pay it, they can attach it. That is what the Bylaw says. So that is an option if you choose not to pay it. I am not sure what other option

the City has, but those are the fines I intend to impose. Do you have any issue with the quantity of the fines that is being sought as being appropriate?

[57] THE ACCUSED: For \$350.00? No, it's not a real issue, Your Honour. I'm going to be going back to council, after this issue has been closed with the Court, to say to them "Well, you've got a limousine out there, you've got all kinds of tour operators. You've got all these things; you have handicap people being picked up and charged, and those vehicles aren't inspected or licensed either. And so I'm going to be making a presentation to council to have the decision of the Court put aside or waived by council, if that's possible. I don't know.

[58] THE COURT: You may have political steps that you can take, and I am certainly not wading into, as I said clearly, the pros and cons of the Bylaw; I have no comment on that because that is not an issue that would have been appropriate for me to comment on. I am simply dealing with your actions and the legal application of the Bylaw to your actions. So you may do that, but the \$250.00 fine will be imposed on the s. 31 offence, and the \$100.00 fine on the s. 80 offence.

[DISCUSSION RE TIME TO PAY]

[59] THE COURT: I will make it four months and you can bring an application if you need an extension of time to pay. Just bring the application prior to the expiry of the four months.

[DISCUSSION RE UNPAID FINES AND OFFENCE CLARIFICATION]

[60] THE COURT: I found that you were operating the Vehicle on the dates that are specified in the Information. Having found that you were operating a vehicle for hire, that now meant that the deficient window, which was not a deficiency if you are just operating a private vehicle, you now had a vehicle for hire with a window that was not proper. So in order for you to be convicted of that, you had to first be convicted of operating a vehicle for hire. The other necessarily flowed from that. So you were not convicted for operating a vehicle for hire with a deficient window from the first time Officer Howell stopped you; it is only on the dates in question when you transported the two Officers.

[61] THE ACCUSED: Okay. So are the fines I just -- is it for every day of --

[62] THE COURT: You are charged with two counts; two instances in which you operated a vehicle for hire rolled up into one charge.

[63] THE ACCUSED: Oh, okay.

[64] THE COURT: Two instances of operating a vehicle for hire with a deficient window, rolled up into one charge. So you have got the fine on each charge, but each charge related to what ended up being testified to as two separate incidents.

[65] THE ACCUSED: So the total fine then is \$350.00.

[66] THE COURT: \$350.00 total. Is there a fine surcharge on these fines?

[67] MS. MOONEY: No, there are not.

[68] THE COURT: No. So there is no fine surcharge. That is the total that you owe on both counts.

COZENS C.J.T.C.