

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MOTOR CARRIER ACT

-and-

IN THE MATTER OF THE MOTOR VEHICLE TRANSPORT ACT

-and-

IN THE MATTER OF THE APPLICATION of CUMBERLAND TRANSIT LIMITED to
amend Extra-Provincial Operating License No. XP00856

BEFORE: David J. Almon, LL.B., Member

APPLICANT: CUMBERLAND TRANSIT LIMITED
Aaron J. D. Wedge, President
Amanda Barlow, Secretary/Treasurer

INTERVENORS

ABSOLUTE CHARTERS INC.
Dennis Campbell, President and CEO

COACH ATLANTIC TRANSPORTATION GROUP INC.
Adam Doiron, President and CEO

MARKIE BUS TOURS
Ward Lucius Markie, Owner

HEARING DATE: November 20, 2018

DECISION DATE: December 18, 2018

DECISION: Application denied.

I INTRODUCTION

[1] Cumberland Transit Limited (Cumberland) applied to amend its Extra-Provincial Operating License No. XP00856, to change its F(1) authority from only allowing it to operate in Nova Scotia, New Brunswick, Prince Edward Island and the State of Maine, to any point in Canada or the USA. Presently, its Extra-Provincial Operating authority allows Cumberland to cover areas from all points in Nova Scotia to and from all points in the Provinces of New Brunswick and Prince Edward Island and the State of Maine, and the reverse thereof.

[2] The Application was received by the Clerk of the Nova Scotia Utility and Review Board (Board) on September 13, 2018.

[3] The Notice of Application was advertised in the *Royal Gazette* on September 19, 2018. Industry distribution by email, fax and regular mail was completed on the same day. Opposition was filed with the Board by Absolute Charters Inc., Coach Atlantic Transportation Group Inc., and Markie Bus Tours, on September 25, 2018.

[4] The Board held a hearing by telephone conference on November 20, 2018. Aaron Wedge, President and co-owner of Cumberland, testified on behalf of Cumberland. Dennis Campbell, President and CEO of Absolute Charters Inc. (Absolute), Adam Doiron, President and CEO of Coach Atlantic Transportation Group Inc. (Coach Atlantic), and Ward Markie, Owner/Operator of Markie Bus Tours (Markie), gave evidence on behalf of their respective companies.

II ISSUE

[5] The issue in this case is:

After taking into consideration s. 13 of the *Motor Carrier Act (MC Act)*, should the Board exercise its discretion and grant the amendment to the license?

III THE LAW

[6] The Board derives its authority under the legislation which created it: the *Utility and Review Board Act*, S.N.S. 1992, as amended, and under the various statutes that it administers, including the *MC Act*.

[7] *The MC Act* regulates motor carrier operators in Nova Scotia to ensure there is a quality, safe motor carrier industry in the Province. To accomplish this, the Board regulates all aspects of the industry. The following overview of the legislation is provided in the Board's decision of *Mac Tours Inc.*, 2008 NSUARB 100:

[69] On reading the *MC Act* as a whole, the object of the legislation is to ensure there is quality, safe motor coach transportation services available in the Province. To accomplish this, the *MC Act* requires the Board to regulate every aspect of the industry from routes and vehicle inspection to rates. The sustainability of this service for the public is the legislation's overriding directive. In balancing competing interest, the Board must do what is in the best interest of the public, giving specific consideration to the line run services, s. 13 (ca).

[70] The *Interpretation Act* requires the Board to consider amongst other issues, the necessity for the legislation (s. 9(5) (a)) and the consequences of a particular interpretation s. 9(5) (f). Factors affecting the necessity for the legislation include that Nova Scotia is not southern Ontario or Quebec. The Province has a very small population. Its demand for motor coach services is far less than the demand experienced in the Toronto/Montreal corridor.

[71] Another factor is that the costs of investing in this industry are large. In the *Trius 2003* decision, the Board states as follows in para.62:

[62] ...Buying, operating, and properly maintaining motor coaches, especially larger ones, is an expensive business for all the operators which are parties to this hearing. New coaches with video, washroom, and air conditioning, regarded as the most desirable of all, have purchase prices in excess of half a million dollars. To ensure a ready supply of relatively new, large coaches, SMT/Nova has bought several such vehicles per year over the last four years. Moreover, other companies currently operating in the low season such as Nova, or Cabana, as well as DRL, have significant investments not just in coaches (especially newer ones), but in other

ancillary assets. These exist to service and support the actual buses, such as storage garages, maintenance facilities, and administrative offices, with Trius itself leasing new premises in Halifax in the spring of 2002. Such assets exist year round, and are expensive to lease, purchase, or maintain.

Considering this large capital investment, it is not financially prudent for people to make an investment if they cease operating within six months. In a small demand area, if companies are out of business in six months, people and corporations eventually stop investing in buses and coaches. Transportation services may then be lost to the public unless supported by government subsidization, community groups, etc.

[72] Another important factor is the various services provided to the public. Regular route public passenger services, commonly known as "line run", provide essential transportation services to students, the elderly, the infirm, and those on fixed incomes who do not have access to independent transportation. This service transports people for many reasons including medical appointments, school, work, adult challenged employment facilities, and visiting family and friends, *King's Transit Authority*, 2005 NSUARB 129, para. 15; and *Need-A-Lift Transportation Services*, 2006 NSUARB 27, para. 26-41.

[73] The industry also provides transportation services to the tourism industry in Nova Scotia which is very important for the Province's economy.

...

[77] Ensuring there is a motor coach industry in this Province is the purpose of the legislation and the responsibility of the Board is to administer it in the best interests of the public. Providing "competition for the sake of competition" is not the Board's job. To provide competition knowing that a carrier may cease operation in six months is contrary to the requirements of the *MC Act*. Section 10 read in light of the legislation as a whole has a specific limited statement which does not in any way alter the requirements of s. 13. In summary, s. 10 only means that an existing licensed carrier has no exclusive right to enjoy any increase demand in the market nor does it have the perpetual right to exist if it is not providing suitable or quality service. That is all s. 10 means and nothing more. The motor coach industry in this Province is not a deregulated or semi-deregulated industry.

[Board Decision, 2008 NSUARB 100, pp. 27-28 and 30]

[8] In assessing an application, the Board considers the public interest; the quality and permanence of service to be offered; the general effect on other transportation services; and the sustainability of the industry, including whether there is a need for additional equipment in the area. "Need" is referenced by asking whether there would be an excess of equipment in the area, if the amendment were granted. These factors are outlined in s. 13 of the *MC Act*:

Factors considered

13 Upon an application for a license for the operation of a public passenger vehicle or for approval of the sale, assignment, lease or transfer of such a license, the Board may take into consideration

(a) any objection to the application made by any person already providing transport facilities whether by highway, water, air or rail, on the routes or between the places which the applicant intends to serve, on the ground that suitable facilities are, or, if the license were issued, would be in excess of requirements, or on the ground that any of the conditions of any other license held by the applicant have not been complied with;

(b) the general effect on other transport service, and any public interest that may be affected by the issue of the license or the granting of the approval;

(c) the quality and permanence of the service to be offered by the applicant and the fitness, willingness and ability of the applicant to provide proper service;

(ca) the impact the issue of the license or the granting of the approval would have on regular route public passenger service;

(d) any other matter that, in the opinion of the Board, is relevant or material to the application.

[9] Specifically, s. 13(a) speaks to whether there would be an “excess of requirements” if the license were issued or amended. The section considers whether there are vehicles currently licensed which could provide the requested services applied for. The question is whether there is a need for the services sought.

[10] Under the *MC Act*, the Board has the same powers, procedures, constitution and practices it has under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended, provided the provisions are not in conflict.

[11] In this Application, the Applicant has the burden of proof to show, on a balance of probabilities, that the Board should grant the amendment, considering s. 13 of the *MC Act*.

IV EVIDENCE

[12] Aaron Wedge, along with Amanda Barlow, are the co-owners of the Applicant, Cumberland. He testified on behalf of the Applicant at the hearing.

[13] Currently, Cumberland is entitled under its License to provide charter services for trips from all points in Nova Scotia to and from all points in the Provinces of New Brunswick and Prince Edward Island and the State of Maine, and the reverse thereof.

[14] The Conditions, Limitations and Restrictions on the License provide for the following:

F(1) RESTRICTED AREA PUBLIC PASSENGER CHARTER SERVICE

The transportation of any organized group from any point in Nova Scotia to any points in the province [*sic*] of New Brunswick, Prince Edward Island and the State of Maine and the reverse thereof, as authorized thereby. Point of exit and entry is the Nova Scotia-New Brunswick Border. 'Permitted to use up to two (2) highway motor coaches or activity buses.'

Effective this 15th day of November, 2005.

[Exhibit C-2]

[15] The Application for Amendment to Cumberland's Extra-Provincial Operating License No. XP00856 provides for the following:

3. The Applicant applies for approval of the following amendment to said license:

From all points in Nova Scotia to and from all points in Canada and USA and the reverse thereof.

4. The following are the reasons for such amendment:

The opportunity for new customers.

[Exhibit C-1]

[16] In his opening statement, Mr. Wedge argued:

I guess if any company is going to grow I guess the only way to grow is to expand this license. There is plenty of work out there for Quebec trips. There's plenty of work out there for Ontario trips and there's plenty of work for United States trips. I guess that we just feel that we should not be held back by the license when, if our buses can leave NS and go to Maine, then why shouldn't we be able to carry on to New Hampshire, Connecticut, Massachusetts. You know, why should we be held back? Our coaches are Nova Scotia inspected so we feel that there is no need to be held back on this.

[Audio file: 2:06]

[17] Under questioning from both Mr. Campbell and Mr. Doiron, Mr. Wedge testified that he has customers calling "all the time" wanting his Company to take them on numerous Quebec and Ontario trips and even to the United States. It was his opinion

that they should be able to, at least, expand the current License and he feels that he has “the right to do so.”

[18] Mr. Wedge was asked if he had any of those customers supplying *indicia* of need or evidence letters, to which he responded:

Well, we don't have a specific or we are not looking for a specific customer. We just want to have the opportunity that if an opportunity comes available, that we can at least quote on the job and I mean, obviously, it's a competitive market and we're not looking to pull any business from any one particular customer but if our phone rings and if there is a request for a trip such as Quebec, North America or what have you, we want to have the opportunity to at least bid on that contract or job, single trip, whatever it may be.

[Audio file: 4:17]

[19] Mr. Campbell asked Mr. Wedge if he was familiar with the test that needs to be met to achieve additional licensing, suggesting:

.... the test of need, to prove need that the service is not being delivered, usually it would, in circumstances like this, you would supply customers that would be able to give evidence about the need and that they can't presently get it and I guess the other things I just ask you is, if you are familiar with the history of the industry in Nova Scotia in the last, I'd say, 10 years, are you aware that the health of the industry was not good and that it's been building back from I'd say a disruption in the industry. Are you familiar with that?

[Audio file: 7:33]

[20] He responded:

I feel that that's not really correct. The number of new coaches that have been bought throughout the Maritimes in the last few years, especially in the last two years, is incredible so for you to say that the industry is suffering, I don't really feel that the industry is suffering. There's plenty of brand-new coaches being purchased in the Maritimes especially within the last few years. Coach Atlantic is a great example so for you to say that the industry is recovering, or it has been crippled, I don't really buy that.

[Audio file: 8:21]

[21] Mr. Doiron added:

I will clarify what Mr. Campbell mentioned was the health of the industry. I will say the health of the industry has improved in the last few years. I think Dennis referred to, you know, in the last ten years and there were too many carriers. The health is really changed in the last few years, so you are right, there has been a lot of new buses in the region and a lot of them are ours as well as Mr. Campbell's and others. Part of that is we have made a business decision to renew our fleet. We are a very high-mileage carrier. A lot to do with the line run and some very large contracts that we have and we feel that making payments on new coaches is far better off than repairing them so our financial statements are available to the Board and they are every year and you will find that our business is healthy,

however we are not extreme and the amount of investment in our Company to fulfill the contracts is very significant.

[Audio file: 9:49]

[22] Mr. Campbell argued that he has never been able to achieve additional licensing of any type, without proving the test of need and giving evidence to that effect. He added that there are no customers that are going without having this need fulfilled at a competitive rate, and so the granting of the license would simply be harmful to the existing operators.

[23] Mr. Doiron testified that 75% of their coaches are sitting idle in the winter season, so to grant expansion of a license where the predominant amount of work is on the off-season, will erode the business of the current operators such as his company. He added that Coach Atlantic invested approximately \$10 million in new equipment in the last 12 months, not all of it in Nova Scotia. He said that Coach Atlantic is able to efficiently run the line-run service because of a healthy charter business. To grant more licenses or an expansion of licenses could potentially erode their business. Like Mr. Campbell, Mr. Doiron does not believe that need and necessity was shown by the Applicant. There was no evidence of customers coming forward that could not get equipment. In this instance, there was no evidence of customers requesting the service and no letters of support.

[24] Mr. Markie also opposed the Application, agreeing with the arguments of Mr. Campbell and Mr. Doiron.

[25] In response, Mr. Wedge argued:

We're not looking for new licenses here and you two seem to be acting as if these are totally new licenses. These are existing licenses that are working the Maritimes and New Brunswick, well, into

New Brunswick and all we are looking for is to expand our territory of travel. This is a pretty simple request and I think it's a pretty fair request.

[Audio file: 36:00]

V FINDINGS

[26] The Board, in a number of past decisions, considered applications to amend licenses, mostly to add additional vehicles. The Applicant emphasized that he does not wish to add additional pieces of equipment; it is an expansion of services under a license to carry further distances. As the opponents in this Application have stated, it is important to place the amendment application in the context of the industry in recent times. It is an industry which was facing some rather significant challenges. It is, indeed, encouraging, to hear from both Mr. Campbell and Mr. Doiron that “the health of the industry has improved” in recent years.

[27] When determining an application, s. 13 of the *MC Act* directs the Board to consider the public interest, the quality and permanence of service to be offered, the general effect on other transportation services, including the impact on regular route public passenger service, as well as assessing whether there is an excess of equipment.

[28] Section 13(a) speaks to whether there would be an “excess of requirements” or **whether there is a need for the services sought** (emphasis added). Section 13(c) refers to the “fitness, willingness and ability” of the service to be provided. The Applicant, in this case, Cumberland, has the burden of proof to show, on the balance of probabilities, that the Board should grant the amendment after considering s. 13 of the *MC Act*.

[29] The Application is for an amendment to its License for the transportation of any organized group from all points in Nova Scotia to and from all points in Canada and the USA and the reverse thereof. Mr. Wedge’s evidence, if anything, was “speculative.” He,

simply, wants to have an opportunity, if the opportunity becomes available. He testified that he would like options.

[30] Often the Board will hear from existing customers, potential customers and community members who will testify or provide letters of support as to the service proposed by the Applicant and the need for the service. Such evidence can be tested by the opposition and the Board. As there were no witnesses at the hearing, other than Mr. Wedge, to speak on the Applicant's behalf, the Board has little evidence before it, and, respectfully, attributes little weight to his argument as Mr. Wedge provided no evidence for charter work that was not already met by existing carriers

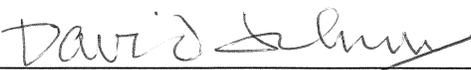
[31] After considering the evidence in accordance with the provisions of s. 13 of the *MC Act*, the Board finds that Cumberland has not met the burden of proof to show, on a balance of probabilities, that the Board should grant the amendment to the License. It has failed to provide any evidence that its vehicles are required in Nova Scotia to operate the service it seeks.

[32] Accordingly, the Board is not satisfied, having regard to the factors outlined in Section 13 of the *Act*, that it is in the public interest to approve this application.

[33] As a result, the Application is denied.

[34] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 18th day of December, 2018.



David J. Almon