

DECISION

**2020 NSUARB 87
M09370 and M09533**

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 APPLICATIONS of PENGBO FU o/a PENGBO'S SHUTTLE
to amend Motor Carrier License No. P03318 and Extra-Provincial Operating License No.
XP03335

BEFORE: Roland A. Deveau, Q.C., Vice Chair

APPLICANT: **PENGBO FU o/a PENGBO'S SHUTTLE**
Pengbo (Rick) Fu

OBJECTORS: **ABSOLUTE CHARTERS INC. o/a COACH ATLANTIC
HALIFAX**
Mary Dempster, Vice-President

COACH ATLANTIC TRANSPORTATION GROUP INC.
Ryan Cassidy

TRANSOVERLAND LIMITED
Craig Carabin
Mitchell Carabin

HEARING DATE: March 17, 2020

WRITTEN BRIEFS: **April 8, 2020**

DECISION DATE: **July 6, 2020**

DECISION: **Applications are denied.**

I SUMMARY

[1] Pengbo (Rick) Fu, operating as Pengbo's Shuttle, filed an application with the Board to amend his Motor Carrier License to add a province-wide charter authority for charters starting in Cape Breton to any point in Nova Scotia (and return), with the exception of Cape Breton cruise ship passengers. He also applied to add an authority to operate as back-up for cruise ship passengers for Bannockburn Tours, Cabot Discovery Tours Inc., Blackwood Tours Limited and Blue Thistle Tours. With respect to his Extra-Provincial Operating License, he applied to add a charter authority to carry passengers from Cape Breton to any point in Newfoundland, Prince Edward Island, Quebec, Ontario and Maine (and return).

[2] Mr. Fu currently operates a 28-passenger bus. He submitted that there is a need in the Cape Breton market for this mid-sized vehicle option, including for cruise ship passengers.

[3] The applications were opposed by Coach Atlantic Transportation Group Inc., Absolute Charters Inc., and Transoverland Limited. They stated that there is an excess of equipment capacity in the charter market and that the applications should be denied to ensure the sustainability of existing carriers.

[4] After reviewing all of the evidence and the provisions of the *Motor Carrier Act*, the Board denies the applications. In each case, the Board finds that there is an excess of equipment capacity in the charter market, and adding new equipment would negatively impact other licensed carriers.

II BACKGROUND

[5] Pengbo's Shuttle (Applicant) is based in Sydney, Cape Breton Regional Municipality, Nova Scotia. At present, it is authorized to operate a regular line run service between Sydney and Baddeck. This service was originally approved by the Board in the spring of 2019 [2019 NSUARB 56], based on Mr. Fu's evidence that there was an urgent need in the Baddeck region for employees (particularly in the hospitality industry), which Mr. Fu would transport from Sydney on a daily basis. In the same Decision, the Board approved Pengbo's Shuttle request to provide a limited charter service to transport an individual or group from Sydney to any point in Nova Scotia (and return), but only for the purposes of employment and employment training [Schedule F(2)]. However, in the same application, the Board denied his request for a province-wide charter authority to offer charters starting in Cape Breton, finding there was an excess of equipment capacity in the charter market.

[6] Mr. Fu operates one 28-passenger vehicle, but has received the Board's approval to add two further 28-passenger vehicles.

[7] In a subsequent matter, the Board approved the issuance of an Extra-Provincial Operating License to Pengbo's Shuttle for the transportation of individuals or groups to New Brunswick, Prince Edward island, Newfoundland, Quebec and Ontario, but limited to the purposes of employment and employment training: see 2019 NSUARB 107.

[8] In the present application, Mr. Fu requests to amend his Motor Carrier License No. P03318 (MCL Application) as follows:

Delete and replace Schedule F(2) [current authority for employment or employment training] with the following:

F(2) SPECIALITY IRREGULAR RESTRICTED AREA PUBLIC PASSENGER CHARTER SERVICE.

To transport any individual or groups from any point in Cape Breton to any point in Nova Scotia, one way or return, except for business from the cruise ships.

Add F(4):

F(4) SPECIALTY IRREGULAR RESTRICTED AREA PUBLIC PASSENGER CHARTER SERVICE.

For the business from cruise ships in Sydney, to operate as back up service for the following tourism companies in Cape Breton: Bannockburn Tours, Cabot Discovery Tours, Blackwood Tours and Blue Thistle Tours.

[9] Further, Mr. Fu applied to add the following new charter authority to Extra-Provincial Operating License No. XP03335 (XPL Application):

F(1) SPECIALTY IRREGULAR RESTRICTED AREA PUBLIC PASSENGER CHARTER SERVICE:

The transportation of any person or group from any point in Cape Breton to any point in Newfoundland, New Brunswick, Prince Edward Island, Quebec, Ontario, or Maine one way, return or the reverse thereof.

RATES, TOLLS AND CHARGES:

D(1) RATES – Remove current and replace with:

Daily Rate	\$1,200.00
Live per Km	\$ 2.50
Deadhead per Km	\$ 2.20

Terms and Conditions

Applicable HST not included in rates.

Free cancellation up to 24 hours before service.

Half price will be charged for cancellation within one day of service.

[10] The two Notices of Application were advertised in The Royal Gazette, posted on the Board's website, and forwarded to licensed carriers by email, fax or mail.

The Notice relating to the Motor Carrier License was published on August 28, 2019, while the Notice respecting the Extra-Provincial Operating License was published on December 24, 2019. The Clerk of the Board received three objections to the granting of the applications from Absolute Charters Inc. (Absolute), Coach Atlantic Transportation Group Inc. (Coach Atlantic), and Transoverland Limited (Transoverland). Last year, Coach Atlantic purchased Absolute, but they continue to operate as separate divisions and maintained separate representations at the hearing.

[11] The hearing was originally scheduled to be held in Sydney, Nova Scotia, along with various other motor carrier applications, on December 11, 2019. However, a number of the matters were adjourned because of pending settlements and weather concerns, and Mr. Fu's matter was re-scheduled to March 17, 2020. The hearing was to be held in Sydney, but due to the COVID-19 pandemic, the Applicant and Objectors agreed that it be conducted by telephone conference. Written submissions by the parties were completed on April 8, 2020.

III EVIDENCE

[12] Mr. Fu appeared on his own behalf. Absolute was represented by Mary Dempster, its Vice-President, while Coach Atlantic was represented by Ryan Cassidy. Craig Carabin and Mitchell Carabin represented Transoverland.

1. Applicant

[13] Pengbo Fu owns and operates Pengbo's Shuttle. He testified that there is a significant need for a mid-size bus in the Cape Breton market, asserting that there is a

gap in the market for this mid-sized option. Mr. Fu stated that the primary motor carrier in the Cape Breton region is Transoverland, whose smallest vehicle is a 48-passenger bus. He added that these larger buses generally cost more to hire than his proposed offering. Noting that the Cape Breton economy is “slowing down”, he suggested that not every group looking to book a charter has the budget for a larger motor coach, or the need for a large vehicle. In his opinion, the local community requires more options for its charter needs in terms of affordability and vehicle size. Mr. Fu stated that he plans to actively target smaller groups that want mid-sized buses, at an affordable rate.

[14] Mr. Fu referred to two recent applications by First Nations communities in the Sydney area, namely Membertou and Eskasoni, both of which had applied for, and received, approval for mid-sized buses. He noted that he did not personally oppose those applications because it supports his view that this type of vehicle is needed in the Sydney market. He noted that, at least in the case of Membertou, the larger coaches operated by Transoverland were not suitable for their needs.

[15] He also submitted that mid-sized buses are needed in the cruise ship market in Sydney. He referred to a letter of support filed by Nicole MacAulay, Manager (Cruise & Administration) for the Port of Sydney. Mr. Fu stated that several points in her letter show the need for more mid-sized vehicles, including the fact that local taxis provide cruise ship passengers with tours of Cape Breton, that Transoverland plans to add greater capacity for the Port, and that local small independent tour companies like Blackwood Tours, Blue Thistle Tours, Cabot Discovery Tours, and Madi G's, provide shore excursions to cruise ship passengers who book them directly.

[16] Mr. Fu filed various letters purporting to be in support of his application, including from the Port of Sydney (described above), Destination Cape Breton Association, Cape Breton Partnership, Bannockburn Tours, Cape Breton Highlanders professional basketball team, Basketball Cape Breton, Cape Breton Island Centre for Immigration, the Municipality of the County of Victoria, Cape Breton Regional Municipality (CBRM), Common Good Solutions (a transportation consultant), and Gordon M. MacInnis, Vice-President (Finance & Operations), Cape Breton University. However, the Board notes that three of these letters were later effectively withdrawn (Bannockburn Tours, Highlanders basketball team and CBRM), and the letters from the Municipality of Victoria and Mr. MacInnis of Cape Breton University were essentially letters of reference only. Further, Mr. Carabin indicated in his testimony that Transoverland has a five year contract with Cape Breton University for its passenger transportation needs.

[17] On cross-examination by Mr. Carabin, Mr. Fu acknowledged that his current mid-sized bus does not have an on-board bathroom, nor does it have full luggage capacity.

[18] Mr. Fu denies Transoverland's position that it will be negatively impacted if these applications are approved by the Board. He stated that Transoverland currently serves the local market with large motor coaches and has no intention to obtain this type of mid-sized bus. In Mr. Fu's opinion, the "market has the right to choose" which type of vehicle it wants to hire and this targeted mid-sized vehicle market will not use Transoverland's coaches even if the Applicant is not in the market.

[19] In support of his application, Mr. Fu also called three witnesses involved in various capacities in the Cape Breton tourism industry.

[20] First, Tyler Mathis was called in support of the application. He is the Economic Development Officer for the Cape Breton Partnership. He elaborated on the letter of support by Carla Arsenault, the organization's President and CEO, which was filed as an exhibit in the hearing. He echoed Mr. Fu's comments that there is a gap in the public passenger market for the mid-sized vehicle option.

[21] Mr. Mathis testified that the Cape Breton tourism industry has grown and is evolving. He stated that smaller custom tour operators have faced transportation challenges with respect to more flexible vehicle size options.

[22] Second, Misty MacDonald, President of Cabot Discovery Tours, also testified in support of the application. She described her experience in the tourism sector, noting she is in her fourth season in the small to mid-range size vehicle market. She operates tours with an 11-passenger Ford Transit, as well as a Commercial Vehicle (CV) License for a 5-passenger Toyota Sienna van. She stated that many clients now want smaller group tours and do not want to embark on a large motor coach. She stated that passengers avoid larger coaches because they are unable to see as much from the vehicle and they feel the touring is slower. She indicated that there are numerous requests for the 18 to 24-passenger size vehicle.

[23] Ms. MacDonald testified that the lack of availability of public passenger vehicles during the September to October cruise ship season is a barrier to growth in her business. She noted that 60% of her business in 2019 was earned in September to October alone, with half of that attributable to the cruise ship market. She added that it can be very difficult to find available vehicles during the fall season, including for non-cruise ship clients such as Celtic Colours. She has looked into hiring carriers from the

Halifax area to bring them into Sydney, but the cost was prohibitive. However, she acknowledged that during the remainder of the year, during the non-cruise ship season, it can be difficult to fill her vehicles. Further, because of this seasonality in the tourism business, it is not feasible to invest in more vehicles. Thus, she supports Mr. Fu's application to add mid-sized vehicle capacity to the market.

[24] Ms. MacDonald agreed with Mr. Fu that approving the applications will not take any business away from other carriers, including Transoverland, since the mid-sized market is a different market. She stated that rather than using larger coaches, cruise ship passengers are booking with smaller tour operators, local taxis, or making alternate plans altogether, such as simply walking in downtown Sydney.

[25] Finally, the Applicant called Josh Rambeau as a witness. He is the owner/operator of Gateway Taxi in North Sydney, Nova Scotia. He agreed with Mr. Fu and Ms. MacDonald that tourists prefer mid-sized vehicles. He considers this clientele to be an under-served niche market. He fully supports the development of such business in Cape Breton.

[26] Mr. Rambeau testified that his taxis serve the Sydney cruise ship market, but that he also refers clients to local tour companies, including Blackwood Tours, Bannockburn Tours and Cabot Discovery Tours. He noted that he also has a wheelchair accessible van and fields calls from cruise ship passengers for his services as early as Spring. For those services that his company cannot fulfill, he steers the clients to the local tour operators.

[27] Moreover, he also sees a need for extra capacity in the mid-sized vehicle market, which is the market for vehicles larger than a 7-passenger van, but smaller than

a motor coach. He described the market as being between 10 and 20+ people in size, including events such as weddings, work events, Christmas and New Year's functions, and high school sports.

2. Objectors

[28] As noted earlier in this Decision, the applications were opposed by Absolute, Coach Atlantic, and Transoverland.

[29] Mary Dempster testified on behalf of Absolute, operating as Coach Atlantic Halifax since it was purchased by Coach Atlantic.

[30] Absolute filed its objection to the MCL Application on September 4, 2019, stating "that the local carrier [Transoverland] is already conducting this business and thus there is no need for additional supply, for this work". It also outlined various reasons for its objection to the proposed XPL Application, as set out in an email dated December 27, 2019, filed with the Board:

Absolute Charters Inc does not believe that there is a need for a 28pax mini (unit requesting the addition of Extra provincial) to require extra-provincial from Cape Breton as we understand that the current local operator [Transoverland] has the capacity to provide this service. Any additional unit providing this service (ie by Pengbo) would seemingly have that the local operator (Transoverland) with sitting equipment. This doesn't directly affect ACI however we wish to support Transoverland to ensure that they continue to be sustainable in Sydney, as they provide a substantial service to all of the cruise ships, and we need this important market to be strong.

[Exhibit P-3]

[31] At the hearing, Ms. Dempster testified that their objection to the applications is not directed at Mr. Fu personally, but is simply the result of there being insufficient volume of business to justify the addition of more equipment into the market. In her view, the capacity of existing carriers must be taken into account when assessing the applications.

[32] Ms. Dempster noted that the then emerging COVID-19 pandemic was causing disruption to the local motor carrier industry. The Canadian cruise ship season had already been postponed to July 1, 2020, with uncertainty surrounding the fall season. She indicated that Absolute had already received cancellations for all its other booked charters. She said the pandemic had decimated the bus industry.

[33] Craig Carabin and Mitchell Carabin testified on behalf of Transoverland at the hearing. Transoverland opposes the applications because it considers that there is excess equipment in the Cape Breton market and no more capacity is required. In Craig Carabin's opinion, if the Board were to approve the applications, it would definitely cut into the market served by Transoverland.

[34] Craig Carabin of Transoverland filed his objection to the MCL Application in an email dated September 4, 2019:

Transoverland wishes to oppose this application as we have more than enough equipment in our yard for the demand. We are constantly replacing equipment with newer equipment to enhance our fleet and believe that any more licenses would impose a negative impact on my ability to do so. As well, I feel our market does not show a need for any more licenses.

[Exhibit P-4]

[35] With respect to the XPL Application, Transoverland filed its objection in an email dated January 7, 2020:

...Again, we see no need for another license here in Cape Breton as we have too many buses sitting for much of the time as well as too much money invested in buses.

[Exhibit P-7]

[36] As Mr. Carabin has noted in his objections to Mr. Fu's prior applications for a province-wide charter authority, except for the September-October busy tourism season, which includes cruise ship work, Transoverland's yard generally has many buses

sitting idle over the remainder of the year. It needs any charter work it can obtain throughout the remainder of the year to make the business feasible.

[37] He stated that the mid-sized vehicle market targeted by the Applicant can, and has, been served by Transoverland. He added that, particularly for longer trips, including trips outside the province, the amenities of a larger coach are important for passengers, including on-board washrooms, ample storage space for luggage, TVs, and extra legroom. He added that Transoverland's rates are not materially different than those proposed by the Applicant (\$1,200 v. \$1,250).

[38] He indicated that he has recently purchased two new motor coaches, at a combined cost of over \$1 million, and he needs all the business he can obtain in order to remain sustainable and invest in his fleet.

[39] Further, Craig Carabin stated that Transoverland owned a 24-passenger bus about eight to ten years ago, but there was no demand for the mid-sized vehicle at that time.

[40] Mr. Carabin echoed the concerns expressed by Ms. Dempster about the COVID-19 pandemic, stating that there is "absolutely nothing moving". He said that everyone has cancelled their charter bookings, including for the traditionally busy March break.

[41] In an email dated August 30, 2019, Mr. Cassidy filed Coach Atlantic's objection to the MCL Application:

This application is requesting licensing authority for work that is presently being supplied by existing licensed carriers and we, Coach Atlantic, oppose this application.

[Exhibit P-3]

[42] With respect to the XPL Application, Mr. Cassidy filed the following objection on December 27, 2019:

Coach Atlantic opposes this application as we believe the existing license carriers can service the market demand. Therefore, no additional extra-provincial licenses should be required.

[Exhibit P-5]

[43] At the hearing, Mr. Cassidy supported the comments of both Ms. Dempster and Craig Carabin. He noted the importance of supply management of the motor carrier fleet in the Cape Breton market.

IV LAW

[44] In Nova Scotia, motor carrier transportation services are regulated under the *Motor Carrier Act (MC Act)*. In general, the *MC Act* regulates motor carrier operators in Nova Scotia to ensure there is a quality, safe, sustainable industry in the Province. To accomplish this, the Board has been given the jurisdiction to regulate virtually all aspects of the industry.

[45] The *MC Act* provides the following guidance to the Board on matters it may consider:

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.

These apply equally to amendment applications, ss.12 and 19.

[46] Thus, in assessing an application, the Board considers, among other factors in s. 13, the public interest; the quality and permanence of service to be offered; general effect on other transportation services; and the sustainability of the industry including whether there is need for additional equipment in the area. In addressing whether there would be an excess of equipment under s. 13(a) above, the Board must consider whether there are vehicles currently licensed which could provide the services applied for. In other words, is there a need for the services and/or equipment sought by the Applicant?

[47] The *MC Act* requires the Board to balance, in each case, the various relevant issues and interests which may overlap and, at times, conflict. In the *Trius Inc.* Decision, dated September 22, 1993, the Board described the s. 13 considerations as follows:

The Board has noted in previous decisions that the various considerations are not mutually exclusive. They tend to overlap and it is difficult at times to isolate one from another. The considerations will not be of equal importance in every application. The weight to be put on various considerations will depend on the facts of each application.

[48] Pursuant to s. 30 of the *MC Act*, the Board also has the same powers, procedures, constitution and practices that it has under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended (*PU Act*), provided they are not inconsistent with the *MC Act* and *Regulations*. The Court of Appeal determined the applicable *PU Act* sections are ss.15-47 and 80-120 (current numbers), *New Glasgow Express Ltd. v. Board of Commissioners of Public Utilities* (1980), 44 N.S.R. (2d) 253. These include most of the sections for setting rates. In being consistent with the *MC Act* and *Regulations*, the Board

has not used all of these provisions; for example, those for setting rates in accordance with a rate base or return on rate base. It has used other *PU Act* provisions such as those dealing with just and non-discriminatory rates. This is discussed in detail in *Kings Transit Authority*, 2008 NSUARB 125, paras. 24 to 32.

[49] The Board has, traditionally, determined rates for motor carriers using current generally accepted accounting principles, examining the company's efficiency and costs of providing the services, and allowing an amount for profit. Costs for providing the services include amounts to recover the expenses for purchasing the buses and other capital over time, as well as the yearly costs of operating the services.

[50] Even when no carrier opposes an application, the Board must be satisfied the application meets the requirements of the *MC Act*, s. 12(3). Furthermore, the Board has the jurisdiction to dismiss an application without a hearing, if the Board is of the opinion the application is not in the public interest (s. 12(3A)).

[51] In each case, the applicant must prove to the Board that, after taking all factors into consideration, the Board should grant the application, *Molega Tours Limited*, 2013 NSUARB 243, para. 23.

V ANALYSIS AND FINDINGS

[52] As noted earlier in this Decision, the Board may take a number of factors into consideration when considering an application for a license, including those listed in s. 13 of the *MC Act*.

[53] First, s. 13(c) requires the Board to consider the “fitness, willingness and ability” of the Applicant to provide proper service, including the “quality and permanence of the service”.

[54] As an existing licensed operator, the Board is satisfied that the Applicant has demonstrated he meets the requirements of s. 13(c) of the *MC Act* and finds he has the fitness, willingness and ability to provide a quality and permanent service.

[55] However, the thrust of the applications relates to the Applicant’s request for an amendment to the Motor Carrier License to add a province-wide charter authority for trips starting in Cape Breton, to provide back-up service to certain local carriers for cruise ship passengers, as well as an amendment to the Extra-Provincial Operating License to conduct charters starting in Sydney and travelling to all points in Atlantic Canada, Quebec, Ontario and Maine, U.S.A. (and return).

[56] Under s. 13 of the *MC Act*, the Board must also take into account what impact approving the applications would have on other motor carriers in the industry. The evidence of the objectors at the hearing was clear that, if approved, these new charter authorities would have a negative impact on existing carriers, particularly upon Transoverland. In their opinion, which the Board accepts, there is an excess of equipment capacity in the local charter market. Adding the new charter authorities would just add to that overcapacity.

[57] In a recent Decision of the Board respecting a Generic Hearing to consider, among other issues, charter services provided as a free service or at a reduced rate, dated May 15, 2020, and reported at 2020 NSUARB 69, the Board reiterated the importance of sustainability to the motor carrier industry. In the context of the discounting

of charter rates, it referred to its *Interim Discount Review Decision*, 2013 NSUARB 21, wherein the Board reviewed the objects of the *MC Act*:

[84] There are no stated objects within the *MC Act*. In summary, however, in reviewing the Legislation as a whole and giving it a broad, liberal and purposive interpretation, the Board has found that the objects of the *MC Act* are to ensure there are safe, quality and sustainable motor carrier public passenger services which best meet the interests of the traveling public within, to, and from Nova Scotia. (See Absolute 2010 NSUARB 171, para. 42.) Absolute and Murphy concur. Furthermore, the sustainability of this service for the public is one of the Legislation's overriding directives. In balancing the various and sometimes competing interests, the Board must do what is in the best interests of the public, giving specific consideration to the line run services, s.13(ca). Finally, the process is to be public.

...

(b) Sustainability

[86] The sustainability of the industry is another key component of the Legislation. The *MC Act* directs the Board to consider each carrier's ability to sustain itself by considering whether it will be able to provide the services on a permanent basis (s. 13(c)). It also requires the Board to consider the sustainability of the industry as a whole by considering the impact on the other transportation services in the province (s. 13(b)) and, in particular, whether there will be an excess of equipment (s. 13(a)). Although this may involve consideration of any transportation services, including rail and air, it is normally limited to the other licensed carriers operating in the province.

[87] There are a number of factors which affect sustainability. The circumstances that exist in Nova Scotia are important for this consideration. The population is scattered and demand for services is low in comparison to more densely populated regions of the country. Tourism is important, but it is a short season. Capital investment is high, but must be paid year round. There is no subsidization. The sustainability of the industry is solely dependent upon the rates the carriers charge. Therefore, addressing rates is an important issue.

[88] In order for the industry to be sustainable, in that carriers are able to provide permanent services, the rates must be sufficient to cover the costs of operating the service and providing some profit to the carrier. Equally important, the rates cannot be predatory, that is, artificially below the cost of service purely to obtain work over other carriers. This not only jeopardizes the existence of the carrier providing the predatory service, but it also impacts other carriers in the industry. [Emphasis added]

[*Interim Discount Review Decision*, paras. 84-88]

[58] The issue of sustainability is not only important in the context of rates, but also in the context of the level of equipment capacity in the market. As noted by the Objectors in their evidence at the hearing, if there is an excess of equipment in the market, that may also threaten the sustainability of carriers in that market.

[59] In the Board's opinion, sustainability is an important issue in the present applications. Ms. MacDonald of Cabot Discovery Tours, who testified at the hearing, referred to the lack of availability of public passenger vehicles during the September to October cruise ship season. She said it can be very difficult to find available vehicles during the fall season. She noted 60% of her business in 2019 was earned in September to October alone, with half of that attributable to the cruise ship market. However, she also acknowledged that, during the remainder of the year, it is difficult to fill her vehicles. This is consistent with the evidence of the objectors, notably that of Craig Carabin and Ms. Dempster, that there is excess equipment capacity outside the busy cruise ship season in September and October. The Board accepts their evidence on this point, and their submission that it is not feasible to add further equipment capacity just for these two months, knowing the equipment will sit mostly idle the remainder of the year. Mr. Carabin has testified in this matter, and in other hearings, that many of his vehicles do indeed sit idle in his yard the remainder of the year.

[60] Mr. Carabin indicated that he needs all the business that he can secure throughout the year to support the investment in his fleet, including for new replacement coaches. Interestingly, Ms. MacDonald acknowledged on cross-examination by Ms. Dempster that, due to the seasonality of the tourism business, there is not enough business throughout the remainder of the year to warrant buying another bus. This point goes directly to the issue of sustainability. It is important that licensed carriers in the regulated industry, including Cabot Discovery Tours and Transoverland, be able to obtain sufficient business throughout the entire year to maintain their fleets and earn a reasonable profit. Approval of the applications in this matter would jeopardize that

sustainability of carriers in the industry. The Board notes Mr. Fu's statement at the hearing that the Cape Breton economy is "slowing down", which further exacerbates the situation.

[61] The Board also has concerns about the evidence presented by Mr. Fu in support of his applications. Much of the evidence he presented was general and anecdotal in nature, lacking the concrete type of evidence that the Board would expect be provided to support of such applications. Except for the evidence of Cabot Discovery Tours, and possibly Gateway Taxi, there was no evidence of actual business that could be referred to Pengbo's Shuttle. Mr. Fu did not identify any potential new business or provide confirmation that clients had been unable to hire other carriers and needed more carriers in the market. Arguably, Mr. Fu did offer an example as Basketball Cape Breton, but Transoverland cast significant doubt on whether that client was a reasonable prospect. A number of the letters of support were not from prospective clients at all, but were from governmental bodies or economic development organizations, like the Municipality of Victoria, Destination Cape Breton Association, and the Cape Breton Partnership. Such organizations clearly support local business initiatives, but are unable to comment on the balance the Board has to find under the *MC Act* to ensure a sustainable motor carrier industry in the local market. Further, as noted above, three letters of support were later effectively withdrawn (Bannockburn Tours, Highlanders basketball team and CBRM).

[62] With respect to Mr. Fu's application to provide back-up service to local tour companies for cruise ship passengers, only Cabot Discovery Tours provided evidence in support of Mr. Fu. Bannockburn Tours withdrew its letter of support in this matter and

there was no indication whether Blackwood Tours or Blue Thistle Tours actually supported the application.

[63] Mr. Fu also referred the Board to two recent approvals granted to the Membertou First Nation and Eskasoni First Nation to operate mid-sized buses. However, the Board notes that these cases are clearly distinguishable in that the buses will generally be used to serve those communities only, and not the public at large. In the case of a new charter authority granted to Membertou to provide tours off the Reserve for its Conference Centre attendees, such tours are for a niche market that Membertou itself developed. In the unique circumstances of that case, the Board approved charters from the Reserve to points within the Province for the purpose of activities and experiences relating to the Mi'kmaq culture: see *Membertou Reserve Band Council*, 2019 NSUARB 147, paras. 50-71.

[64] Further, at the time of hearing, the impact of the COVID-19 pandemic was becoming apparent. The Canadian cruise ship season had already been postponed until July 1, 2020, and there was much uncertainty about the remainder of the 2020 tourism season. Ms. Dempster and Mr. Carabin indicated that in the weeks leading to the hearing they had received cancellations for all their upcoming charter bookings. In the Board's view, this is not an environment in which to add extra vehicle capacity.

[65] As noted earlier in this Decision, the Applicant has the burden of proof to show, on a balance of probabilities, that the Board should approve the applications.

[66] Taking into account all of the evidence in this matter, the Board concludes that the Applicant has failed to provide sufficient evidence that the Board should approve the additional charter authorities. The Board accepts the evidence of the objectors that

existing operators are able to serve the market identified by Mr. Fu with the existing motor carrier equipment fleet.

[67] Accordingly, the Board is not satisfied, having regard to the factors outlined in s.13 of the *MC Act*, that it is in the public interest to approve these applications. The Board denies the applications.

[68] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 6th day of July, 2020.

A handwritten signature in black ink, appearing to read "Roland A. Deveau". The signature is written in a cursive style with a large initial "R".

Roland A. Deveau