

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MOTOR CARRIER ACT

- and -

IN THE MATTER OF THE APPLICATION of SOUTHLAND TRANSPORTATION LTD.
to amend Motor Carrier License No. P03357

BEFORE: Richard J. Melanson, LL.B., Member

APPLICANT: **SOUTHLAND TRANSPORTATION LTD.**
Brian P. Casey, Q.C., Counsel

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

BLUENOSE TRANSIT INCORPORATED
Shane Buchan, President

COACH ATLANTIC TRANSPORTATION GROUP INC.
Michael Cassidy, Director
Ryan Cassidy, Operations Analyst

MAC TOURS INC.
Michel Richard, President

MOLEGA TOURS LIMITED
Marie Malloy, President

R. DALE HATFIELD o/a MINAS BASIN TRANSIT
R. Dale Hatfield, Owner/Operator

WARD L. MARKIE o/a MARKIE BUS TOURS
Ward L. Markie, Owner/Operator

HEARING DATE: **October 15, 2020**

DECISION DATE: **February 24, 2021**

DECISION: **Application is denied.**

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I SUMMARY

[1] Southland Transportation Ltd. (Southland) currently holds Motor Carrier License P03357 (License), which allows it to provide school bus service pursuant to a contract with the Halifax Regional Centre for Education (HRCE). The company has a registered office located at 11 Frazee Avenue in Dartmouth. Southland applied to the Board, pursuant to the *Motor Carrier Act*, R.S.N.S 1989, c.292 (MCA), to amend the terms of the License to allow it to provide charter services throughout Nova Scotia with eight school buses, with a capacity of 71 passengers each. Vehicles which are designed as school buses, but are used for charter purposes, are generally called activity buses. Southland said there was a need for such a charter service and the granting of the amendment would have no significant impact on the existing licensed motor carriers. Southland provided proposed rates for review and approval.

[2] Southland's proposed license amendment was opposed by seven licensed motor carriers. They said that there was insufficient evidence to establish a need for an additional charter service. The objecting motor carriers said the existing licensed carriers have available equipment to service the demand for the charter service proposed by Southland. The objectors submitted that Southland's proposal would create an excess of available equipment and have a negative impact on the sustainability of the motor carrier industry.

[3] The Board has considered the evidence and submissions made during the hearing in the context of the tests it applies to amendment applications seeking a new charter service. The Board is not satisfied that Southland's evidence establishes, on a balance of probabilities, that there is sufficient demand, at this time, for an additional

charter service using eight activity buses with a capacity of 71 passengers each. The Board accepts the evidence of the objecting motor carriers that granting this application will likely lead to an excess of activity buses which gives rise to sustainability concerns within the industry. The Board therefore denies the request to add the proposed charter service to the License.

II BACKGROUND

[4] On July 7, 2020, Southland applied to amend the License by adding the following service:

(1) Specialty Services

The chartered transportation of individuals and/or groups within the province of Nova Scotia, one way, return or the reverse thereof, for the purposes of school or day care field trips, summer day programs, private social events, public events, charity work, employee transportation or employer planned events, and emergency response.

[Exhibit S-1, p.2]

[5] Southland originally proposed to have 114 activity buses licensed to provide the charter service. During the application process, the company scaled back its request so that the proposal before the Board was that eight activity buses should be licensed for this purpose.

[6] A Notice of Application was advertised in the Royal Gazette on July 15, 2020. As well, it was posted on the Board's website and forwarded to licensed motor carriers by email, fax or mail. Objections to Southland's proposed amendments were filed by Absolute Charters Incorporated o/a Coach Atlantic Halifax (Absolute), Bluenose Transit Incorporated (Bluenose Transit), Coach Atlantic Transportation Group Inc. (Coach Atlantic), Mac Tours Inc. (Mac Tours), Molega Tours Limited (Molega), R. Dale Hatfield o/a Minas Basin Transit (Minas Transit), and Ward L. Markie o/a Markie Bus Tours

(Markie Tours). On October 15, 2020, the Board held a virtual hearing on the GoToWebinar platform, with all parties participating.

III ISSUES

[7] The only issue to be determined in this proceeding is whether the license should be amended to allow Southland to provide a charter service, as described in the application, throughout Nova Scotia, with eight activity buses, at the proposed rates. For the reasons that follow, the Board has determined that the answer to this question is no.

IV EVIDENCE

[8] Brian Casey, Q.C., counsel for Southland, called three witnesses in support of the application. Kyrie Geurts is Southland's Regional Director, Ontario East. Kyle Johnson is Southland's General Manager, for Saskatchewan. He also coordinates business development across Canada. Coady MacNeil is the Operations Manager in Dartmouth. He is generally responsible for day-to-day operations, including dispatch, scheduling, safety, and maintenance.

[9] Southland's parent company is Pacific Western Transportation (PWT). Ms. Geurts advised that PWT has been in business since 1957 and is Canada's largest privately held passenger transportation company. Southland has operated for over 40 years. It is involved in student transportation and other forms of passenger conveyance. Information from Southland's bankers related to its financial stability was provided in confidence.

[10] Southland's License allows it to provide the following service in Nova Scotia:

F(1) SPECIALTY SCHOOL BUS SERVICE

The transportation of pupils and teachers to and from schools operated by the Halifax Regional Centre for Education; also for the transportation of pupils, teachers and chaperones of said schools for any school purposes including transportation to and from school social, dramatic, musical or athletic functions or competitions, teachers' institutes and similar activities in the Province of Nova Scotia in accordance with a contract filed with the Nova Scotia Utility and Review Board, effective as and from January 16, 2020 and ending on July 15, 2025 with an option to extend for a further 24 months.

[Exhibit S-2, p. 6]

[11] If this application is granted, Southland intends to initiate the service on July 1, 2021, using eight of the school buses which are part of the fleet the company will make available to service the HRCE contract. As the Board understands it, Southland currently has 144 school buses available for use in Nova Scotia. It has 129 daily school runs, each requiring one school bus. The HRCE contract requires that there be a 10% margin of spare vehicles, which equates to 13 vehicles, to ensure commitments are met if buses must be taken out of service for maintenance, inspections, or other reasons. Therefore, Southland has two vehicles which are not strictly required under its contractual commitments to HRCE. The company would use some of the other spare vehicles when they are not out of service. As well, the school runs would not operate in the summer months.

[12] The main differences between a school or activity bus service and a highway motor coach service relates to the lack of any luxury items on school buses, such as coach seating, air conditioning, and washrooms. There is also no overhead luggage storage. Due to comfort considerations, the foregoing can limit the distance that the service can be provided. This is one of the reasons Southland is not seeking an extra-provincial license. With brand new vehicles, Southland is seeking to position itself between the highway motor coach market and a budget or economy style service.

[13] Southland's evidence related to demand, and the impact the granting of the application would have on the motor carrier industry in Nova Scotia, was general and often anecdotal. The main thrust of the evidence is summarized by the Board as follows:

- Stock Transportation Limited (Stock) held a license authorizing it to provide charter service with 53 activity buses. Its charter license was revoked in 2017 and there are currently 39 fewer activity buses licensed in the Province;
- Drivers formerly employed by Stock have advised Southland there are customers currently not being serviced, primarily in short-run intercity pickups and returns. The drivers would like to be able to supplement their work hours, as they had done when employed by Stock. This would be beneficial to Southland's driver recruitment efforts;
- Because of the target market, there would be limited risk that the proposed service would impact the highway motor coach aspect of the industry;
- The COVID-19 pandemic has put much of the charter industry at a standstill, resulting in limited response to Southland's feelers as to local market demand. As the situation normalizes, Southland expects a rebound in demand and sees some indications of this elsewhere in Canada. The "Atlantic Bubble" should also assist in realizing the pent-up demand for local travel;
- Nova Scotia, and Halifax Regional Municipality (HRM) in particular, has seen a significant population increase in the last number of years. As

well, the lowering number of drivers' licenses being issued in younger demographics across the country points to a need for public transportation. This should drive an increase in demand for the type of service described in the proposed License amendment;

- The proposed rates would add competitive market pressures. Southland filed a chart as part of Exhibit S-17 comparing sample rates between carriers from specific points in the HRM, which included all rate components, including deadhead rates (which are charges per kilometer to move empty buses to and from a carrier's designated equipment point);
- Southland acknowledged it had been difficult to generate much response to inquiries related to their potential service because of the COVID-19 pandemic. The company fielded some 25 inquiries about potential service. Without a license, it had not actively pursued marketing or followed up to any great extent. In addition to field trips and school type transportation, Southland sees opportunities in employee transportation, industrial project transportation, charitable or non-profit transportation and local events transportation; and
- The Southland witnesses also responded to questions from some carriers concerning whether the activity bus charter service would, in effect, be subsidized by the HRCE school bus contract. Basically, the Board understands the charter service was intended to be profitable on its own. That said, it was Southland's view that there was nothing unusual or

inherently wrong with utilizing cost synergies associated with dual use equipment.

[14] The objecting motor carriers filed a joint submission with respect to the application. This submission summarized the state of the activity bus industry in Nova Scotia in 2019 as follows:

- Coach Atlantic has ten activity buses and a utilization rate of 26%;
- Bluenose Transit operates eight activity buses with a utilization rate of 18%;
- Markie Tours offers five activity buses and has a utilization rate of 24%;
- Mac Tours operates three activity buses with a utilization rate of 23%;
- Minas Transit has two activity buses and a utilization rate of 6%; and
- Absolute and Molega do not offer activity bus service. This said, Mary Dempster, Vice-President of Absolute, stressed that conversion from vehicles Absolute does carry to activity bus service is a real concern in the Nova Scotia market.

[15] Shane Buchan, President of Bluenose Transit, offered some historical perspective on the 53 licensed activity buses formerly operated by Stock. Mr. Buchan was the owner of Perry Rand Limited, from which Stock acquired the 53 licensed activity buses. He said that the buses in question were located throughout Nova Scotia. They were also used to do significant contract work with the Department of National Defence (DND) and school related activities. Much of the DND work withered away over time and the former Halifax Regional School Board bought some twenty buses of its own. Based

on his experience with Perry Rand and his experience since re-entering the activity bus business, there was not an active market for 53 activity buses when Stock lost its license.

[16] Michael Cassidy, a director, and the operating mind of Coach Atlantic gave evidence as to the limited market for activity buses, accounting for approximately \$100,000 in revenue for his company out of a total of approximately \$26 Million in annual revenue in 2019. Ms. Dempster described the entry of eight new activity buses in such a limited market as simply “trading dollars” from the existing licensed carriers to the new entrant. Michel Richard, President of Mac Tours, Ward Markie, owner/operator of Markie Tours and R. Dale Hatfield, owner/operator of Minas Transit, all discussed the limited market for activity buses and the negative impact a new entrant would have on their business.

[17] While some of the objecting carriers had expanded their activity bus fleet, or re-entered the market, in anticipation of capturing what they thought was a market opportunity left open by Stock’s departure, this market expansion has failed to materialize. Little in the way of explanation was offered or explored in this proceeding, although Marie Malloy, President of Molega, indicated the industry as a whole had lost considerable work, presumably related to school extra-curricular activities, as a result of the teacher’s “strike” in 2017.

V LAW

[18] As is often the case where lay litigants appear before the Board, the distinction between submissions and evidence is not fully appreciated. The Board has had considerable experience in assessing the weight to be placed on these types of

presentations. As well, Section 19 of the *Utility and Review Board Act*, S.N.S.1992, c.11, provides that the Board is not bound by the strict rules of evidence. Not surprisingly, therefore, no objection was taken to hearsay evidence, which was presented, to some extent, by all the parties. Finally, the state of the motor carrier industry arises in many cases before the Board. The Board has also initiated its own generic proceedings where this issue has been canvassed [see: *Discount Review Decision*, 2015 NSUARB 33 and *Generic Public Hearing Decision* 2020 NSUARB 69]. The objecting carriers' evidence is generally consistent with previous matters determined by the Board.

[19] The principles and tests the Board applies with respect to this type of application are well known in the provincial motor carrier industry. They have been reiterated on many occasions and are well summarized in *Re Pengbo Fu o/a Pengbo Shuttle*, 2020 NSUARB 87, affirmed 2020 NSCA 83, at paras. [44] to [47] and [51]:

[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.

...

[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.

VI SUBMISSIONS

[20] Mr. Casey submitted that the only relevant considerations raised in the evidence relate to the factors under ss. 13 (a) and (b) of the *MCA*: namely, whether granting the application would create an excess of capacity or excess facilities in the Province and the public interest considerations related to the general effect granting the application would have on other transport service. He submitted that the alleged advantage, raised by the objectors, arising because Southland's fleet may have a portion of its fleet expenses covered by the HRCE contract, is simply not relevant. Mr. Casey

further submitted that the impact of the COVID-19 pandemic was unknown. The pandemic should not be a significant factor in the Board's deliberations. In any event, the delay in the requested activation date of July 1, 2021, should help alleviate concerns related to this uncertainty. Mr. Casey submitted what was known was that prior to 2017, there were 53 licensed activity buses in Stock's fleet. These had been eliminated by the Board's decision to revoke Stock's charter authority. In the ensuing three years, only 14 new activity bus licenses had been granted. According to Mr. Casey, it therefore stands to reason that with 39 fewer licensed activity buses in a growing population area, the market is underserved. Even if the Board were to accept the evidence that not all 53 activity buses were used for charter purposes, there was still a need shown. This was confirmed by the Board granting an average of five new activity bus licenses over the three years since Stock left the charter market. The fact that the market was underserved was confirmed by evidence that during September and October there was a need for additional equipment to address cruise ship requirements. In summary, it was Southland's position that it would be in the public interest to allow the application, which would provide quality affordable service without significant negative impacts on existing licenced carriers.

[21] With respect to the impact granting the application would have on other motor carriers, Mr. Casey pointed to the limited impact it would have on Coach Atlantic, given the small amount of annual revenue generated from this source in 2019, when compared to total revenues. With respect to the other carriers, he said utilization rates did not tell a complete picture, given that a company can still be viable even if its equipment sits idle part of the year.

[22] The motor carriers who objected to the granting of the application raised the following points, as summarized by the Board:

- Southland has failed to provide sufficient evidence that there is a need for the proposed service which cannot be met by the existing motor carriers;
- While some of the objecting carriers expanded their fleet (and Bluenose Transit was essentially a new entrant) in the wake of Stock losing its charter authority, significant new opportunities for the current motor carriers has not materialized. They are fully capable of meeting existing demand;
- The Nova Scotia market for activity buses is limited and a new entrant will simply be taking away business from existing carriers, to the detriment of their sustainability, which is sometimes referenced as “trading dollars”;
- Even for those carriers who do not offer activity buses, there is a range of motor coaches and vehicle types and conversion from these other smaller vehicle types is a real concern, when considering events such as weddings and local functions;
- The price comparison analysis provided by Southland was not accurate;
- Increased population has not translated to increased activity bus charter business;
- Some objectors questioned Southland’s ability to use eight school buses, since it appeared only two were completely outside the HRCE

requirements. They pointed out that during the school year, it was highly unlikely a full complement of eight school buses would be available, given the maintenance and inspection requirements related to such vehicles;

- Allowing a school bus operator to compete with the existing licensed carriers, where a large part of the school bus operator's fleet expenses are covered by taxpayer funded school contracts, places the existing licensed carriers at a disadvantage in the marketplace; and
- The uncertainty surrounding the COVID-19 pandemic means Southland's projections should be viewed with skepticism.

VII ANALYSIS AND FINDINGS

[23] The Board is satisfied that Southland has the financial means and the relevant experience to provide a safe, permanent, and quality service. Except for the availability of equipment, which will briefly be discussed later, none of the objecting motor carriers raised any issues with this aspect of the test the Board must apply. As well, no evidence was presented indicating the proposed service would have any impact on regular route public passenger service, often referred to in the industry as line run service. The Board agrees with Mr. Casey that this matter primarily turns on an assessment of the factors listed in s.13(a) and (b) of the *MCA*.

[24] This case has some similarities with a matter recently considered by the Board in *Re Stock Transportation Ltd.*, 2021 NSUARB 10, where the Board denied a request for amendments to a motor carrier license to add an activity bus charter authority

to a school bus authorization. In both cases, the applicants have existing contracts with HRCE and wish to use school buses which are listed, or will be listed, under their licenses, as activity buses for charter purposes. Both applicants placed significant reliance on Stock's 53 licensed activity buses prior to the revocation of its charter authority combined with the fact only 14 new activity bus licenses were subsequently issued.

[25] There are also material differences between the applications, including:

- Southland is requesting authority for far fewer activity buses;
- Southland's requested authority is arguably more restricted, although Stock's target market may have been more focused;
- Stock clearly had available school buses that could be dedicated to the activity bus market outside the HRCE contract; and
- The focus of the applicants' evidence and the respective business models were different in many respects.

[26] Therefore, the *Stock Decision's* rationales are not wholly applicable to the issues before the Board in this application. This said, the general comments the Board made about the difficult balancing act inherent in the economic regulation of a competitive market are equally applicable to this case:

[42] Unlike the situation with line runs, there are a number of companies who offer charter services in the Province. The economic regulation of a competitive industry creates conceptual challenges. It means standard economic concepts related to competition determining the outcome of the supply/demand equation has been legislatively modified. This requires a balancing of interests which are not always easy to reconcile. The interests of the currently licensed motor carriers, applicants who wish to enter the market or expand their operations, the existing and potential motor carrier clientele, and the general public interest in having a viable and safe industry to support tourism and travel must be considered. While there are no stated objects in the *MCA*, the Board has considered this issue in the *Interim Discount Review Decision*, 2013 NSUARB 21:

[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. [Emphasis added]

[43] The Board has on numerous occasions commented that the circumstances which exist in Nova Scotia are an important consideration. In the *Interim Discount Review* decision, the Board made the following comments at para. [87], when discussing sustainability, which continue to be applicable:

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.

[44] While the *Interim Discount Review* decision related to rates, as pointed out in *Pengbo*, sustainability is also important in the context of excess equipment, which can threaten the sustainability of carriers who have already made their investment to service the market. The Board has also commented in the past that there is need to maintain viable carriers in different parts of the Province, so that local needs do not suffer from excess consolidation. It is the very dynamics of market size, limited peak season, high capital investment and the need for province-wide service which provides a foundation for economic regulation, in this Province, of an industry which has largely been deregulated in many other jurisdictions.

[27] Consistent with its findings in the *Stock* Decision, the Board is not persuaded that the fact there were 53 activity buses licensed to Stock in 2017 when its charter license was revoked, with only a corresponding increase of 14 activity buses in the provincial fleet since that time, establishes there is an unmet demand for this type of service. In fact, in the *Re Bluenose Transit* Decision, 2018 NSUARB 170, the Board only awarded the applicant eight activity buses, when ten were sought, because it was not satisfied a demand for ten additional activity buses had been established. The *Bluenose Transit* Decision is instructive, because it was also premised, to a degree, on the same argument that Stock's departure from the charter market left an untapped service need. Given Bluenose Transit's utilization rates since acquiring its license, experience has not proven this to be the case. As well, the evidence of the objecting motor carriers satisfies

the Board that the activity bus market was relatively static for most of the years in the period prior to the COVID-19 pandemic.

[28] With respect to the argument raised about Ms. Malloy's comment of having to sometimes turn away work during September and October, it is important to note Molega has no activity buses. Mr. Markie pointed out he does not turn away activity bus work during this busy time in the cruise ship season. In any event, the Board on numerous occasions has commented upon the fact that a lack of available equipment, for a few days at the height of the cruise ship season, does not justify granting licenses for additional equipment whose carrying costs must be paid throughout the year to ensure safe and reliable service. In certain circumstances, the Board has granted limited authority licenses to allow for backup service to be provided to help alleviate the cruise ship requirements. This is not the type of license amendment sought in this case.

[29] Consistent with many of its past decisions, the Board does not consider the limited inquiries as to the potential services, or anecdotal evidence from former Stock drivers, of the general and undocumented nature discussed in the evidence, without any documented instances indicating the requested services could not be provided by the existing licensed motor carrier fleet, establishes a need for such service. The Board recognizes that Southland does not currently have an activity bus charter license which makes obtaining detailed evidence about potential bookings more difficult. This does not preclude Southland from obtaining market data through surveys or other documented means [see, for example: *Re Fame Tours Inc.* 2017 NSUARB 171]. This type of evidence is especially important when considering the size of the proposed activity bus fleet. While the number sought in this matter is less than the 35 vehicles Stock requested, it must be

recognized that, with Bluenose Transit, the proposed fleet size would be second only to Coach Atlantic in the Nova Scotia market. If granted, it would mean Southland would have a significant percentage of the licensed activity buses. More detailed evidence as to market need is required for such a significant increase to the licensed fleet. From the Board's perspective, this is particularly the case where Southland was unable to clearly articulate why eight activity buses was the appropriate number, when the issue was raised in cross-examination by Mr. Cassidy.

[30] Population growth figures and evidence of the changing patterns with respect to the acquisition of drivers' licences among certain demographics does not establish a market need for activity buses. The increased Nova Scotia population has not manifested itself in significant utilization of the existing licensed activity bus fleet. The studies related to the acquisition of drivers' licenses were not filed with the Board. It was unclear if the lower numbers related to a decrease in the youth demographic as a whole, or an increasing percentage within that demographic who did not seek to obtain a license. In any event, there was insufficient evidence to establish this demographic was likely to use charter activity buses.

[31] The Board accepts that, generally speaking, those seeking highway motor coach charters form a different market demographic than those seeking activity bus charters. That said, leaving aside the fact that most of the objectors operate activity buses, there are numerous vehicle types that lie between school buses and large highway motor coaches, which can attract the same clientele. In this sense, the Board agrees with Ms. Dempster that the markets are not entirely distinct. There is the possibility of "conversion" in relation to certain classes of vehicles. For example, Ms. Malloy expressed

a concern that she did not want to see Molega, which does not operate activity buses, lose market share in relation to weddings and seniors' groups, which appeared to be part of the market sought by Southland. While these concerns are real, they were not a significant factor in denying this application, given the lack of detailed market evidence presented in this matter.

[32] As discussed in the *Stock* Decision, the COVID-19 pandemic continues to have an impact on the tourism market. While Southland tried to minimize this factor as a consideration, Mr. Markie expressed the view it was unlikely the industry would return to normal for at least five years. While it is true that the overall impact is not currently known, it appears to the Board completely unrealistic to expect the "Atlantic Bubble", with its changing shape depending on the status of the pandemic in the four Atlantic provinces, could replace a market demand for what has been lost. As well, while it may be the hope of the motor carrier industry, the Board was presented with no reliable evidence there would be increased demand for activity buses in Nova Scotia related to local travel being generated due to the international and national travel restrictions arising from COVID-19. The evidence from Southland establishes that responses to queries about interest in the proposed service were tepid because of the pandemic. There is no evidence to establish the market will have normalized by the proposed July 1, 2021, start date. To introduce a significant new entrant in the midst of the pandemic without presenting any detailed evidence of current market demand would not appear prudent.

[33] The Board accepts the evidence of the objecting carriers that their activity bus fleets are not being fully utilized and they are capable of servicing the current demand for this type of service. Granting additional activity bus authorities will likely create an

excess of equipment or facilities. Absent some quantifiable numbers related to market demand, in the circumstances of this case, the most likely result is that Southland will require material portions of the other licensed carriers' business to make its service viable. This is what Ms. Dempster refers to as "trading dollars" in a static industry. The concept was discussed by Michael Gardner, a Board retained expert, where fee discounting was equated to adding licensed vehicles to a stable market, in the *Discount Review* Decision, at paras. [82] and [83]:

[82] The Gardner Pinfold Report noted that requests in recent years by carriers to adopt different discounting methods would ultimately not be in the public interest:

Current industry participants indicate that discounting without Board approval had been common practice in the industry from the late 1990s. Over the ensuing decade, this practice weakened the ability of several carriers to maintain coaches, undermined their viability and caused or contributed to their exit from the industry. This was not in the public interest because it was disruptive and undermined the sustainability of the industry. With the exit of several of these carriers since 2005, the industry arrived at a position of relative stability.

...

It is difficult to see how the public interest would be served if all carriers adopted the same discounting methods to the same degree. True, in the short to medium term, the public could benefit from lower transportation costs if carriers competed by offering services at rates below their approved levels. But in the longer term, if these discounting practices were to continue, the industry would be faced with the same kinds of financial weakness and instability that contributed to the recent round of consolidation. This clearly would not be in the public interest. [Emphasis added]

[Gardner Pinfold Report, Exhibit D-5, p. 9]

[83] In the end, Mr. Gardner stated that irrespective of the type of discounting method used, and whether or not the discounting methods operated within defined parameters, the Motor Carrier Industry will be less sustainable through price competition:

... the effect of price competition is the same: industry revenues are lower than they would be had approved tariffs been charged. This weakens sustainability. The effect is little different from that which would obtain by allowing additional coaches into a stable market: average capacity utilization would fall with available revenue spread over higher capital costs. [Emphasis added]

[Gardner Pinfold Report, Exhibit D-5, p. 9]

[34] A review of the chart set out in Exhibit S-17 indicates that, for the specific listed trips originating and ending in HRM, Southland's proposed rates would generate lower total fees than all carriers except Coach Atlantic. The higher fees for the other carriers appears primarily related to deadhead charges, which, in addition to attempting to ensure fees are sufficient to cover operating costs, do also offer some protection from competition to carriers in their local markets. The Board notes that very little time was spent explaining the purpose of this Exhibit. Its purpose, or underlying assumptions, were not spelled out in any detail. In any event, even assuming the accuracy of the assumptions, which was challenged by the objectors, what the chart does show is that while consumers could potentially benefit if Coach Atlantic were not available to provide service, which would appear to be relatively unlikely given its available equipment, the impact on the ability of carriers such as Bluenose Transit and Markie Tours to put their idle equipment to work would likely be negatively impacted, given the pricing differentials. The evidence was insufficient to show that Southland's price points would generate a new market demand, rather than simply shifting market demand from other carriers, such as Bluenose Transit and Markie Tours, at the lower price point. As well, the chart at Exhibit S-17 is only a snapshot chosen by Southland and does not capture the entire scope of available pickup and drop-off points if it is granted a province-wide charter authority. Given the evidence of the objectors as to the static nature of the activity bus market, in order to move towards a viable charter service profit-centre, Southland would probably have to seek business outside of HRM.

[35] The Board therefore finds that the granting of the application will likely lead to a loss of market share which will impact the sustainability of existing licensed carriers

such as Mac Tours, Bluenose Transit and, Markie Tours. While the revenues generated by Coach Atlantic in the activity bus market may not have been significant when compared to its overall revenue, it must be kept in mind that these were pre-pandemic numbers. In the current pandemic atmosphere, given a high capital cost, low margin industry, where no reliable evidence exists of demand in excess of available equipment or poor service from existing carriers, it is important to maintain viable carriers in all areas of the Province. All income streams are important. A redistribution of this stream would likely have a negative impact on the motor carrier industry as a whole.

[36] The Board understands that the traditional construct of competition usually determines the outcome of which operators get to service demand, and the role of competition in addressing choice, price, and quality of service issues, in an unregulated market. The legislative scheme under the *MCA* does not eliminate price competition with respect to activity buses, and it does not preclude new entrants into the market. That said, with specific reference to excess facilities, and the impact on other transport services, the legislation does place a burden on an applicant to establish that its proposed service is needed and cannot be met by existing licensees. That burden has simply not been met in this application.

[37] While the foregoing analysis is sufficient to dispose of this application, the Board considered the arguments of the objectors that Southland was creating an unlevel playing field because the activity buses it proposed to use were part of a fleet that was used to fulfill the HRCE contract. The basic premise is that the taxpayer funded education system would be used to subsidize a portion of the costs associated with the operation of these buses. It would appear that this aspect could at least be considered under public

interest considerations, and similar concerns have been raised with respect to directly subsidized transport services. In the *Generic Hearing* Decision, the Board suggested this could be addressed through the rate structure by not allowing subsidized carriers to materially undercut other licensed carriers. In this case, there was a dispute as to whether the HRCE contract involved a type of subsidization at all. In any event, in the circumstances of this case, the Board has not relied on this objectors' argument in denying the application.

[38] Finally, the Board will comment on the issue of activity bus availability raised by the evidence. Given the requirements of the HRCE contract, it would appear difficult for Southland to use the proposed eight buses on a reliable and permanent basis. That said, provided the eight buses are not undergoing maintenance, they would presumably be physically available after the school runs, on weekends and during the summer months. Southland appeared to acknowledge there might be some challenges, but that it was up to the task of responding to the challenge through dispatch management and maintenance planning. The Board would have concerns if the management of the issue required a constant shifting of authorized vehicle plates rather than having a dedicated fleet. Furthermore, Mr. Buchan raised the issue that his company was required to paint over yellow school buses, when used for charter purposes, by the Motor Carrier Division (MCD), which is the inspection and enforcement arm under the *MCA*. The Motor Carrier Division operates under the umbrella of the Department of Transportation and Infrastructure Renewal. Licenses issued by the Board are ordinarily subject to MCD requirements. While these issues might warrant further investigation if the Board were

inclined to grant this application, given its earlier findings, they need not be explored further.

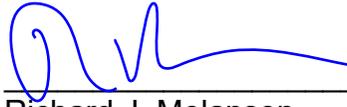
[39] In the final analysis, the Board has determined that Southland has not demonstrated a need for the proposed service that cannot be satisfied by the current complement of licensed activity buses. It would not be in the public interest to authorize the excess of equipment which the granting of this application would create. In undertaking the difficult balancing act between various competing interests, the potential negative impacts to the sustainability and availability of the existing fleet across the Province would appear more substantial than the public interest in creating more competition in this market at this time. The Board therefore denies the application.

VIII CONCLUSION

[40] The Board has reviewed and considered all the evidence and submissions in this matter. Applying the applicable law, and the tests developed by the Board, it finds that, on a balance of probabilities, Southland has not shown that the factors set out in s.13 of the *MCA* favour the granting of this application. The Board is not satisfied that there is sufficient demand for a charter service operating throughout the Province using eight activity buses with a capacity of 71 passengers each. The Board is satisfied demand for charter services utilizing activity buses can currently be provided by the existing licensed carriers. The Board finds the granting of the application would create an excess of equipment which could potentially be detrimental to the sustainability of components of the motor carrier industry. The application is therefore denied.

[41] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 24th day of February, 2021.



Richard J. Melanson