

DECISION

**2024 NSUARB 122
M11540**

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MOTOR CARRIER ACT

- and -

**IN THE MATTER OF THE APPLICATION of KATHLEEN MACDONALD O/A SAVOUR
CAPE BRETON TOURS for the issue of a Motor Carrier License**

BEFORE: Bruce H. Fisher, MPA, CPA, CMA, Member

APPLICANT: **KATHLEEN MACDONALD O/A SAVOUR CAPE BRETON
TOURS**
Kathleen MacDonald, Owner/Operator

OBJECTORS: **CABOT DISCOVERY TOURS INC.**
Misty MacDonald, President

BLACKWOOD TOURS LIMITED
Robert Jurcina, President

HEARING DATE: April 3, 2024

DECISION DATE: **July 10, 2024**

DECISION: **Application approved as modified.**

I SUMMARY

[1] Kathleen MacDonald o/a Savour Cape Breton Tours applied to the Board for a Motor Carrier License to operate one 12-passenger van for the transportation of individuals or groups within Cape Breton for “immersive tours indulging in local flavours and fascinating history”. She proposed three tours including the Taste of Sydney Tours; Puffin Tours at Bird Island; and Private Cabot Trail Tours. The first two tours would originate at the cruise ship terminal. Ms. MacDonald made the application under the *Motor Carrier Act*.

[2] The application was opposed by Cabot Discovery Tours Inc. and Blackwood Tours Limited. Both Paul MacNeil o/a Halifax Titanic Historical Tours and Thariq Ali o/a Prestige Limousine had originally objected but withdrew their objections with the understanding that Ms. MacDonald was operating only on Cape Breton Island. The Board scheduled a virtual hearing to consider the application and the objections.

[3] The Board has considered the evidence and submissions made during the hearing and considered the test it applies to applications for a new license and charter authority under the *Motor Carrier Act*. In such applications, the applicant must generally show that there is a demand for the proposed services which cannot be met by the existing carriers in the market.

[4] I am satisfied that the evidence establishes, on a balance of probabilities, that there is enough demand to establish the Taste of Sydney tours in Cape Breton. There is not, however, evidence showing sufficient demand for tours originating outside the cruise ship terminal. In these circumstances, granting that portion of application will likely cause an excess of equipment in the market. I am, therefore, approving the Taste of

Sydney Tour and the Puffin Tour. The Private Cabot Trail Tours are permitted providing they originate at the cruise ship terminal.

II BACKGROUND

[5] Kathleen MacDonald o/a Savour Cape Breton Tours, of Sydney, Nova Scotia, applied to the Board on January 25, 2024, for a Motor Carrier License under the *Motor Carrier Act*, R.S.N.S. 1989, c. 292 (*MCA*) to operate one 12-passenger van with the following rates, terms, and conditions:

D(1) – RATES:

Taste of Sydney Tour - \$200 per person for 5 hours – passengers will be picked up at the Sydney Cruise Pavilion for a food and history experience, including 11 local eating establishments.

Puffin Tour - \$200 per person for 6 hours from May 21 to August 24 – passengers will be picked up from the Sydney Cruise Pavilion, driven to Bird Island Tours in Big Bras d'Or and lunch will be included before returning to the Pavilion.

Private Cabot Trail Tours - \$1,400 for up to 11 people – a flexible itinerary which may include Ingonish, Keltic Lodge (Middle Head Trail), Cabot Trail, West Mabou Beach including lunch and whiskey tasting at Glenora Distillery. All fees are exclusive of HST and levies.

SCHEDULE E – VEHICLES:

One 12-passenger vehicle

SCHEDULE F – AUTHORITIES

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

The transportation of any person or group from anywhere in Cape Breton to anywhere in Cape Breton for immersive tours indulging in local flavours and fascinating history

[6] A Notice of Application was advertised in the Royal Gazette on February 7, 2024, as well as posted on the Board's website and forwarded to licensed motor carriers by email, fax, or mail. Cabot Discovery Tours Inc. (Cabot); Blackwood Tours Limited (Blackwood); Halifax Titanic Historical Tours (Titanic); and Prestige Limousine all objected to the application. Titanic and Prestige withdrew their objections.

[7] A virtual hearing to consider the matter was scheduled and held on the GoToWebinar platform on April 3, 2024. Cabot was represented by its President, Misty

MacDonald, while Blackwood was represented by its President, Robert Jurcina. The Notice of Hearing provided filing dates for submissions or documentation to be filed in advance of the hearing. Both Cabot and Blackwood filed submissions.

III EVIDENCE

[8] Ms. Kathleen MacDonald testified on behalf of her application. She has gained experience in the industry, having worked a season for Grape Escapes, and possesses a Class 4 Drivers Licence. She has a degree in Tourism and Hospitality Management and co-owns a restaurant in Downtown Sydney that she is currently selling.

[9] Her objective is to acquire a 12-passenger van and primarily provide food tours for cruise ship visitors. She has considerable connections in the restaurant industry in Sydney and has arranged with select restaurants to provide small bites at a good price point. She expects the "Taste of Sydney" Tour to stop at 11 restaurants during a five-hour tour. Kiju's Restaurant at Membertou is to be included in the tour. The Membertou Heritage Park sent a letter "fully" supporting her proposed Taste of Sydney Tours. Destination Cape Breton also supplied a letter of support. Three Sydney restaurants sent letters of support as did Tulle Tourism Consulting. While awaiting a licence, she has started walking tours to the downtown restaurants

[10] She hopes to supplement the food tour business through trips to other parts of Cape Breton including Puffin Tours at Bird Island and The Private Cabot Trail tours. She described the latter as possibly including kayaking or bachelorette parties. While her main objective is the food tour, she doesn't want to limit herself simply to the food tours. She sees the tours as innovative and stated that food tours work in many port cities and questions why it wouldn't work in Sydney.

[11] Ms. MacDonald emphasized that she understands the number of cruise visitors to Cape Breton in 2024 is expected to increase by 54,154 more passengers than in 2023. She explained that:

Everyday that a cruise ship comes into Sydney I get visitors in my restaurant who ask for direction on what to do, where to go and what to eat in the area. I also get many questions about our local industry and heritage. I believe there are a large number of visitors who don't wish to hop on a bus to tour the island; rather they want to explore the port in which they arrive. With more cruise ships and more visitors coming into the Port of Sydney this year I believe there is a market for visitors who want to experience a more intimate small tour of our area.

[Exhibit M-15, p.1]

[12] She expects to purchase a used vehicle for cash and provide the tours herself, without any staff. She provided pro forma financial information on a confidential basis. While her goal is to fill the 12-person vehicle, she has not done any surveys and her sense of demand is based on discussions with various individuals and businesses. She is prepared to take the risk. At this point her start date may be the Spring of 2025. She may request an adjustment to her rates.

[13] Misty MacDonald is President of Cabot Discovery Tours. She didn't object to the Taste of Sydney tours or other tours that originate from the cruise terminal but "to tours outside the cruise market in Cape Breton, where I believe there is sufficient capacity among tour operators." She presented data from her own operations and stated that the "demand is there at cruise" and "fairly strong" for food tours. But this isn't the case for her Cabot Trail day tours where numbers were lower and there is less demand. She noted that in 2023:

Not only are the numbers down, but I also experienced more days where I struggled to meet minimum numbers to run the tour. This was noticeable and aligned with what we were hearing from local hotel operators who also noticed sales were down in Baddeck, the area that I operate the day tour from.

[Exhibit M-16, p.2]

[14] Ms. Misty MacDonald has operated her own similar tasting tour in the past but, except for private groups, is not planning it for 2024 (due to issues around restaurant availability during peak times). She advised that there is a “difference between booking a tour and looking for ‘things to do’ in an area.” She stated that:

Based on experience, and without evidence to the contrary, I would expect that if the folks Ms. MacDonald sees in her restaurant were looking for an organized tour they would have purchased it in advance.

[Exhibit M-16, p.1]

[15] In his submission Mr. Jurcina stated that he didn’t see the need for another tour operator when his “application for a wheelchair accessible bus was denied by the Board, not once, but twice!” He emphasized that there were many other companies doing business at the dock and that she should start out small, perhaps with a van. At the hearing he stated that:

... people [are] coming to your restaurant and asking for things to do. Right, you work in a restaurant, and you got people from the cruise ships coming in and they’re wondering ‘what else is there to do in Sydney’? While those are the people that don’t want to take a tour. So, if you are going to put on a tour and gonna charge them 150 bucks to go have a little snack here and there, I’ll guarantee you they’re not the ones that are, that are going to your restaurant asking ‘what’s there to do in Sydney’? Because the ones that want to go on a tour, they book with us, and they book through the ships, ... buses. They’re the ones they actually want to go and see Cape Breton Island, and a little bit of culture, and a little bit of history. They’re not the ones that are going walking down Charlotte Street, going in and, and window-shopping in the stores, and going in and having a snack in your restaurant and asking you ‘what’s to do in Sydney’? They’re the ones that don’t want to spend any money. So, if you are looking into, to gather those people in with a \$150 tour, I’ll say [you’re] not, its not going to happen.

[Sound File:29.07]

IV LAW

[16] As is often the case with lay litigants appearing before the Board, the distinction between submissions and evidence is not fully appreciated. The Board has considerable experience assessing the weight to be placed on these types of presentations. As well, s. 19 of the *Utility and Review Board Act*, R.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. All the participants were affirmed at the start of the hearing. Statements made by the participants were considered as evidence, subject to considerations related to weight, no matter at what stage in the proceeding these were made.

[17] As well, 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).

[18] The principles and tests the Board applies 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's 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.

V FINDINGS

[19] Sustainability of the motor carrier industry is a key component of the economic regulation of a competitive business sector under the *MC Act*. This was discussed in the *General Public Hearing Decision*, 2020 NSUARB 69, where the Board stated:

[15] In the *Interim Discount Review Decision*, 2013 NSUARB 21, the Board reviewed the objects of the *MC Act*:

...

(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.

[20] Section 13 of the *MCA* provides guidance about what matters should be addressed in making an application to the Board for a new license, including evidence about the "fitness, willingness and ability" of the applicant to provide service of "quality and permanence"; the impact on other transport services; and whether approving the application would result in an excess of motor carrier equipment in the market.

[21] While it is up to an applicant to decide how the application is presented to the Board, it is reasonable to expect that an applicant would provide evidence about how it intends to operate and the potential clientele. Preferably this should be a written business plan, but at a minimum at least some documentation is required to support the application. This might include:

- financial projections of forecasted revenues and expenses, including operating expenses such as salaries, fuel, insurance, repairs and maintenance, as well as expenses to purchase, lease, or finance the motor coach, bus, minibus, van or limousine to be used in the business;
- any financial analysis undertaken including projected ridership and breakeven points based on a few assumptions;
- the qualifications, training and experience of the applicant and key employees to manage and operate a safe and sustainable motor carrier business; and,

- a marketing or sales plan about the target market, how the applicant intends to attract its clients, and more importantly, to demonstrate to the Board that this clientele is not already being served by the existing motor carrier industry. This type of evidence would generally include:
 1. letters and emails from potential clients who tried to hire existing carriers but were refused because the carriers were not available,
 2. letters or emails of support from potential clients that show there is a “niche” market that is not adequately served by existing carriers, and
 3. survey or market research that demonstrates the size of the market and demand for any increased service.

[22] The documentation should be filed in advance of the hearing. Depending on the sophistication of the business, the documentation should normally include, at the very least, a *pro forma* income statement supported by estimates or quotes from potential suppliers; diplomas, training certificates and résumés of the owner/operator and key employees; and letters of support and testimonials from potential clients, groups and associations describing why the new service is needed and cannot be served by existing motor carriers. Where the application is opposed, those who wrote letters of support may be required to appear at the hearing if required by the objectors and the Board.

[23] In this application, Ms. MacDonald presented some evidence to support her application. She has experience and training in the tourism industry and has worked for another tour operator. As a restaurant owner, she is well placed to understand the food industry and how it could be used to create a food tour. On the other hand, the financial

projections she provided were quite basic and it is unclear whether there is sufficient demand to sustain a food tour.

[24] The objectors did not provide any evidence suggesting a food tour was not viable, other than their cautions that casual inquiries about activities in Sydney may not translate into a willingness to pay for a tour. Ms. Misty MacDonald did state that she felt there was available demand for tours at the cruise terminal.

[25] Ms. Kathleen MacDonald presented no evidence of unmet demand for her Puffin or Cabot Trail tours. I would accept Ms. Misty MacDonald's argument that there is sufficient capacity through existing carriers to meet the demand for tours outside the cruise ship market. I am not prepared to approve new tours in this segment of the market but will approve the Puffin and Cabot Trail tours if they originate from the cruise ship terminal.

[26] I have concerns as to whether this proposal is sustainable. I note Ms. MacDonald's comments that she may postpone the tours until 2025 and might have to adjust her prices. I also note that she feels that if the business fails, she is prepared to sell the vehicle and recoup any losses. As she is planning to purchase the vehicle in cash, she may be able to keep her operating costs lower than otherwise. Ms. MacDonald strikes me as a determined individual who is passionate and knowledgeable about both Cape Breton and Tourism although her proposal would benefit from more rigour in its analysis. I am somewhat encouraged by Ms. Misty MacDonald's comments about demand for tours originating from the cruise ship terminal.

[27] On balance I see limited downside to allowing the Taste of Sydney Tours. I believe that Ms. Kathleen MacDonald may be able to build her business up and make it

sustainable. I also conclude that there is a public interest in having such tours provided as it would benefit the local tourism and restaurant industry. While I am not allowing tours originating outside of the cruise ship terminal, I will permit the Puffin and Cabot Trail tours provided they originate from the cruise ship terminal.

VI CONCLUSION

[28] I have reviewed and considered all the evidence and submissions in this matter. Applying the applicable law, and the tests developed by the Board under the *MCA*, I find that, on a balance of probabilities, the applicant has shown that the facts support the granting of this application for the Taste of Sydney tours and the other tours provided they originate from the cruise ship terminal. The application is approved as adjusted.

[29] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 10th day of July 2024.



Bruce H. Fisher