

DECISION

NSUARB-PTA-10-11
2010 NSUARB 171

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 ABSOLUTE CHARTERS INCORPORATED
for the issuance of a Temporary Authority under the provisions of the said *Acts*

BEFORE: Dawna J. Ring, Q.C., Member

APPLICANT: **ABSOLUTE CHARTERS INCORPORATED**
W. Brian Gillis, Vice President
Jack Smellie, Charter Manager

HEARING DATE: May 5, 2010

**ORAL DECISION
DATE:** **May 5, 2010**

**WRITTEN
DECISION:** September 2, 2010

DECISION: **Other than moving the double decker vehicles to New Brunswick and using the articulated coaches for driver training, the applications were denied.**

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I INTRODUCTION

[1] These are the written reasons for the Board's decision to refuse the temporary authority Applications of Absolute Charters Incorporated ("Absolute") requesting to use an additional seven (7) articulated Prevost coaches ("coaches") and 11 double decker buses ("buses" or "double deckers") for its charter services provincially and extra-provincially for three months commencing April 19, 2010, to July 19, 2010.

[2] The Board has rarely, if ever, issued reasons for temporary authorities and decided there was a need to provide clarification for carriers and new applicants.

[3] After hearing from the representatives for Absolute, and considering the objects and intent of temporary authorities under the *Motor Carrier Act*, R.S.N.S 1989, c. 292 (the "*MC Act*"), the Board permitted the transportation of eight (8) of the 11 buses to Saint John, New Brunswick one way, and the use of the seven (7) coaches for driver training purposes only, otherwise the Applications were denied.

[4] Temporary authorities may be issued by the Board if there is an "immediate or special need" for the services requested, pursuant to s. 9 of the *MC Act*, the operative subsection reading as follows:

Temporary authority

9 (1) Notwithstanding any other provision of this Act or the regulations, when it is made to appear to the Board that there is an immediate or special need for the provision of a service in the transporting of passengers the Board, in the discretion of the Board, and without advertisement, public hearing or other proceedings, may grant a temporary authority or trip permit to a person to provide the service on such terms and conditions as the Board prescribes. [Emphasis added]

...

[5] Absolute filed with the Board two applications to amend its permanent Motor Carrier License No. 2697 (the "License"). The first was filed on April 9, 2010, to add the 11 double deckers. Each vehicle has 72 seats for an additional 792 seats in the province. A separate application was filed on April 12, 2010, to add the seven (7) coaches. Each vehicle has 68-72 seats for an additional capacity of 476 to 504 seats in the province.

[6] On April 16, 2010, Absolute applied for the temporary authority to use the above coaches and (10) double deckers for its charter services throughout the province and extra provincially for three months. The total additional seats to be immediately added to the charter market in Nova Scotia would be between 1,268 and 1,296.

[7] The temporary application noted the following as the immediate or special need for the services:

Permanent application to add the above vehicles have been filed with the Board. There is an immediate need to license these vehicles with the Board so that we can use them for training both the double deckers and the articulated Prevosts. Some of the double deckers are going into service for the season in Saint John, NB and we would like to move these to Saint John in late April and early May to have them in position for driver training.

[8] The Board requested in writing further clarification from Absolute which was received on April 27, 2010. Ultimately, the Board convened a hearing on Wednesday, May 5, 2010. Present at the hearing for Absolute were W. Brian Gillis, Vice President; and Jack Smellie, Charter Manager. The witnesses gave evidence as a panel. Natalie Aisthorpe, the Director of the Motor Carrier Division, also provided information to the Board.

II ISSUE

[9] Does Absolute meet the test for temporary authority under s. 9 of the *MC Act*?

III EVIDENCE

[10] Absolute's witnesses stated the immediate need for the double deckers was that eight (8) would be utilized at the Saint John Port where Absolute was awarded a contract to provide services for cruise ship operators in that province. Absolute has partnered with Greyline and the Canadian Breast Cancer Foundation to make the public more aware of breast cancer. The buses are painted pink. The buses were required in Saint John for training of the drivers, advertising functions, and promotional tours, including one in Moncton on its way to Saint John. A gala event, with the Canadian Cancer Foundation, the Port of Saint John, and the City of Saint John, was to occur on May 13, 2010. Under the circumstances, Absolute could not wait until the last day for the advertising of its permanent amendment application on May 12, 2010.

[11] Absolute would move these eight (8) double deckers to Saint John in groups as they became ready for inspection, were approved and licensed. One was required in Saint John immediately. Four (4) or five (5) would be transferred around May 11, 2010. The last few would be transferred when they were inspected. The first time the buses would be used for charter services was June 8, 2010, when the first cruise ship arrived in the Saint John Port.

[12] These buses are slow. It takes them approximately 9.5 hours to travel from Halifax to Saint John. Consequently, when they are transferred to Saint John they will remain there for the season. However, at the close of the cruise ship season they will return to Halifax where they will be serviced and possibly parked for the winter.

[13] The witnesses testified another three double deckers could potentially be used in Halifax this year for Absolute's hop-on hop-off service provided to the cruise ships. Absolute has found this is a very successful product as it allows people the flexibility of seeing what they wish to see in the City, stop for the length of time they wish to stop, and return to the cruise ship when they want.

[14] In the future, these buses may also be utilized in Sydney and/or Charlottetown, but Absolute would not commit them to these ports for this year. A person operating these types of buses in Charlottetown had recently sold them to a collector and, therefore, they would be leaving Prince Edward Island. Absolute testified some of the cruise ship lines they service are concerned with the types of buses they have received in Sydney and are interested in having a double decker operate at that Port.

[15] Absolute stated these buses are very scarce and it tries to acquire them as they become available. Initially, Absolute considered purchasing six (6) or possibly eight (8). However, after the sales meetings in Miami in February/March, additional cruise ship lines joined in the Breast Cancer Foundation promotion.

[16] Therefore, Absolute increased the number of buses it required in Saint John to eight (8). Ten (10) buses were sought in its temporary authority application, although

its permanent application requests a license for 11. The 11th bus remains in England and is due to be transported to Canada shortly.

[17] No other carrier operates double decker buses in Nova Scotia.

[18] Absolute stated the seven (7) Prevost articulated coaches are needed for a variety of reasons. First, Mr. Smellie stated that since joining Absolute in 2005, the charter industry has changed. In the past, the multi-day tours represented a significant part of the company's charter services. This is no longer the case.

[19] Absolute provided a chart [Exhibit 1] showing the decline in the number of days Absolute was booked and actually operated multi-day tours. These multi-day tour days would be generated from a number of the major tour companies like Absolute, Tauck Tours and Groupe Voyageurs. Multi-day tours include the transportation of any group which has hired the coach for more than one day for a tour, such as a group that may fly into Nova Scotia and take a seven day tour around the Maritime provinces, or locals who take a shopping trip to Maine.

[20] In 2006 Absolute had 1,129 multi-day tour days booked for the season. Of those, only 739 multi-day tour days actually took place. In contrast, four years later, Absolute has only 565 multi-day tour days booked for 2010 and optimistically estimates 400 will actually occur. Historically, Absolute has operated between 50% and 70% of the number of days it had booked. Consequently, the Board notes Absolute may only operate 325 or fewer multi-tour days this year.

[21] Second, there has been an upswing in the cruise ship market. Mr. Smellie states the Halifax Port Authority website shows that there continues to be an increase in

the number of cruise ships coming to Halifax. In 2010, the Port expects 133 cruise ships versus 118 in 2009 and 125 in 2008. The number of passengers will increase to approximately 240,000 or 250,000 versus 228,000 in each of the last two years.

[22] Third, the number of cruise ships attending the port on the same day will increase slightly. There are as many as five cruise ships scheduled to be in the Halifax Port on the same day. This will result in approximately 12,000 passengers being in Halifax at one time. In addition, there will be a slight increase in these multi-cruise ship days. The first will occur on June 17, 2010, and another follows four days later on June 21, 2010.

[23] Fourth, with an increase in the number of cruise ships arriving at the Port, there is also an increase in Port security. Port security no longer permits people to walk from their ship to Pier 22. Rather, people must be transported by buses. In the past, the Port has hired coaches and done this work themselves. This year the Port Authority tendered the bus work for this pier-to-pier shuttle service. Absolute had bid on this contract which was to have been awarded by the end of March 2010. As of the hearing date no decision had been reached. Absolute's witnesses testified the company continues to be in the running for the contract as a representative of the Port Authority was coming to its offices to view the articulated coaches.

[24] Fifth, when Absolute is busy with these multi-cruise ship days, it is also busy with other charter work. It provided three examples. Absolute has a contract with the Department of National Defence and will be busy during the Nova Scotia International Tattoo, the 100th Anniversary of the Navy in the last week of June, and the Queen's visit.

[25] Sixth, in past years, Absolute has had a challenge to obtain the seating capacity it needs on cruise ship days and, in particular, on the days multi-cruise ships are in Port. The cruise lines that contract Absolute do not want to be told that they cannot sell the package tours to their passengers. As stated above, the most successful tour package offered by Absolute to its cruise ship lines is the city hop-on hop-off tour. In addition, as noted by Ms. Aisthorpe, Absolute will offer a new combination tour which is a half day Peggy's Cove tour/half day city hop-on hop-off tour. Mr. Smellie testified that in the past Absolute has used almost every other carrier licensed in the province, to the extent they can, to assist with the cruise ship work, including Cabana, Acadian Intercity, Trius Tours, Trius Inc., Molega, A.S.H., Can-Am, etc. Although he has used Transoverland in the past, he did not last year because Transoverland did not have equipment available to bring to the Port of Halifax.

[26] This year Absolute states it will have more challenges getting the capacity it needs for two main reasons. First, some of the cruise ship lines Absolute services have recently advised they do not wish to use semi-coaches. Rather, they want vehicles with high back seats, air conditioning, coach style windows and a washroom, whether the washrooms are used or not. These demands will reduce the resources Absolute will be able to draw from this year. Second, Mr. Gillis testified there will be fewer buses or coaches available from the motor carriers licensed in the province. Trius, for example, is reducing its fleet size because of the same changes in the charter industry that Absolute has seen. Mr. Gillis was advised on the day of the hearing that A.S.H./Can-Am presently

have two late models and a 2001 coach for sale, but are looking at possibly selling three additional buses when the market for selling used coaches improves.

[27] Seventh, Absolute's witnesses stated they had requests from some schools to use the articulated coaches this year. Absolute declined the work as it could not put the coaches into the charter market as yet, but it sees that there may be a use for them in the off season. In particular, the coaches could be used to take students and others to Martock and/or Wentworth and it could charge a per head cost.

[28] How many of the articulated coaches will actually be used by Absolute is unknown at the present.

[29] The immediate need of Absolute for use of the articulated coaches is to train its drivers. Absolute's witnesses described how the back section of the bus maneuvers differently than is expected and, therefore, drivers will need to be trained at all of the intersections within the city, and in and around the Peggy's Cove area, before they are used on the tours. It is expected there will be at least two drivers trained on a coach at the same time. It may take at least two or three days to train each driver. At the present time, Absolute intends to train approximately 12 drivers.

[30] The Board asked whether the coaches/buses were purchased or leased, and when they were acquired. All have been purchased. Absolute began to consider purchasing some of the double deckers in July of 2009. In the fall of 2009, an expert Absolute retained from one of its cruise lines - Holland America, informed Absolute of the availability of the articulated coaches and recommended Absolute purchase them. There were no discussions, however, until January 2010 and towards the end of that month

Absolute had a tentative agreement to purchase up to five of these units, subject to their inspection. It was not until the end of the Olympics in February/March, when Absolute actually acquired the coaches.

[31] It is the Board's understanding there are no other licensed carriers operating articulated coaches in Nova Scotia. Metro Transit uses them in its intercity services.

[32] The Board provided Absolute's witnesses with a copy of the 2001 Board decision, *Trius Tours Limited*, 2001 NSUARB 13. Although that case dealt with an amendment application, the Board read the following obiter statements about temporary authorities:

[40] SMT and DRL applied to the Board for temporary authorities for twenty 55 passenger and forty-five 57 passenger motor coaches and ten 56 passenger motor coaches respectively based on increased demand for charter equipment during the 2000 season. ...

[41] These temporary authorities are limited under s. 9 of the Act to a three month period renewable for a further three months. The Board believes that the intent of the Act was to provide for a temporary operating authority as an exceptional measure to enable a prompt response to unusual circumstances. The process for granting temporary authorities is considerably more streamlined than the time-consuming licensing process for permanent applications under the Act.

[42] The growth in tourism over the last several years, and the corresponding increased demand for coach equipment has resulted in carriers using the temporary authority process to meet peak season requirements. While this increased demand may have been somewhat unexpected initially, it is now predictable that a significant influx of coach equipment is necessary to meet demand during the tourist season.

[43] It is no mystery as to why carriers choose to apply for temporary authority rather than permanent licensing for this additional equipment. Since temporary authority proceedings are generally *ex parte*, there is no requirement for advertising and, consequently, no opportunity for opposition from other carriers. ...

[Emphasis added]

[33] The Board advised Absolute that it was concerned with granting a temporary authority which would allow Absolute to operate more than 1,200 additional passenger seats for all types of charter work for the first three months of Nova Scotia's charter

season, while avoiding the rights of the other carriers and the public to object to the applications or be heard by the Board before granting this large influx of seats into the province. Consequently, the Board wanted to know how Absolute's applications were an "immediate and special need" as described by the Board in the *Trius* case. Mr. Smellie explained the immediate need was to transport the eight (8) buses to Saint John, the need to train the drivers on both types of buses, and the requirements of the first multi-cruise ship day on June 17, 2010.

[34] The Board then asked Absolute why it did not seek its amendment applications before purchasing the buses which were contemplated in July and October 2009. Mr. Smellie stated that he had 'not thought of it'.

[35] The Board then asked the witnesses what Absolute would do with the coaches/buses if there was opposition to their permanent applications and, ultimately, they were not licensed by the Board. Mr. Smellie assured the Board there was no intent to circumvent the public hearing process. The Board does not doubt the sincerity of this statement.

IV LAW

[36] The Extra-Provincial temporary authority application was made pursuant to the *Motor Vehicle Transport Act*, 1987, R.S.C. 1985, c. 29 (3rd Supp.), (the "*MVT Act*"). Pursuant to s. 5 and 6 of the *MVT Act*, the Board is to administer extra provincial licenses under the same regulatory regime as is provided for in the province. Consequently, in Nova Scotia, both temporary applications are administered under the province's *MC Act*.

[37] Other than temporary authorities, the *MC Act* requires every application, including those for new licenses or amendments to be advertised in the Royal Gazette and other places as directed by the Board, s. 12(1). When an application is opposed, the Board must hold a public hearing before granting the application, s.12(1A).

[38] When deciding an application, including an amendment application (s.19 (2)), the Board is to consider the factors outlined in s. 13, which reads as follows:

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.

[39] The Board may grant or refuse the application, or partially grant the application (s. 14); and may add terms and conditions to the license (s. 16).

[40] For temporary authorities the above process does not apply. There is no advertising or public information that the application has been made and no public hearing.

For ease of reference, s. 9 states:

Temporary authority

9 (1) Notwithstanding any other provision of this Act or the regulations, when it is made to appear to the Board that there is an immediate or special need for the provision of a service

in the transporting of passengers the Board, in the discretion of the Board, and without advertisement, public hearing or other proceedings, may grant a temporary authority or trip permit to a person to provide the service on such terms and conditions as the Board prescribes.

Effect of temporary authority

(2) A temporary authority granted under this Section authorizes the person to whom it is granted to provide the service specified in the authority for or within the time specified in the authority, not exceeding ninety days, but shall create no presumption that a corresponding permanent authority or license will be granted thereafter.

Extension of temporary authority

(2A) A temporary authority granted pursuant to this Section may be extended by the Board for a period not exceeding ninety days beyond the time specified in the authority.

Contents of trip permit

(2B) A trip permit shall specify the trip and vehicle to which it applies.

Limit on trip permits

(2C) No more than six trip permits may be issued to one person within any twelve-month period.

Offence

(3) A violation of or failure to conform to a term or condition of a temporary authority or trip permit granted under this Section constitutes a violation of this Act.

[Emphasis added]

The Board may only grant the temporary authority, if the Board considers there to be an immediate or special need.

V FINDINGS

[41] When interpreting legislation, the Board is required to read the legislation as a whole and give it a broad and liberal interpretation to ensure the attainment of the objects and intent of the legislation, s. 9 of the *Interpretation Act*, R.S.N.S. 1989, c. 235, *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485; *Cohen*

v. Nova Scotia (Workers' Compensation Board), 2007 N.S.C.A. 118 (at para. 18); *Dell Holdings Limited v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32, para. 21; and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (S.C.C.). The most relevant provisions of s. 9 of the *Interpretation Act* read as follows:

Interpretation of words and generally

9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

...

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

...

[Emphasis added]

[42] In reviewing the *MC Act* as a whole, the Board has found the *MC Act* regulates all aspects of the motor carrier industry including all licenses, amendments, transfers, and rates to ensure there are quality, safe motor coach transportation services available to the public of Nova Scotia. The *MC Act* recognizes the large investments made by carriers licensed in the industry. If there is an excess of equipment and those investing in vehicles do not survive, people may stop investing in the industry and Nova Scotia could lose some transportation services for its public. At a time when other provinces in Canada

were considering deregulating its motor coach industry, Nova Scotia maintained its regulation and ensured that in each application the Board should consider the effects on the line run services in the province.

[43] The following overview of the legislation is provided in *Mac Tours Inc.* decision, 2008 NSUARB 100:

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

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

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

62 ... Buying, operating, and properly maintaining motor coaches, especially larger ones, is an expensive business for all the operators which are parties to this hearing. New coaches with video, washroom, and air conditioning, regarded as the most desirable of all, have purchase prices in excess of half a million dollars. To ensure a ready supply of relatively new, large coaches, SMT/Nova has bought several such vehicles per year over the last four years. Moreover, other companies currently operating in the low season such as Nova, or Cabana, as well as DRL, have significant investments not just in coaches (especially newer ones), but in other ancillary assets. These exist to service and support the actual buses, such as storage garages, maintenance facilities, and administrative offices, with *Trius* itself leasing new premises in Halifax in the spring of 2002. Such assets exist year round, and are expensive to lease, purchase, or maintain.

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

[72] Another important factor is the various services provided to the public. Regular route public passenger services, commonly known as "line run", provide essential transportation services to students, the elderly, the infirm, and those on fixed incomes who

do not have access to independent transportation. This service transports people for many reasons including medical appointments, school, work, adult challenged employment facilities, and visiting family and friends, *King's Transit Authority*, 2005 NSUARB 129, para. 15; and *Need-A-Lift Transportation Services*, 2006 NSUARB 27, para. 26-41.

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

[44] The Board finds that an essential feature of the regulation of the motor carrier industry in Nova Scotia is the public process required if there are to be any proposed changes to the industry, whether those changes are as a result of a new license, transfer of a license, an amendment to an existing license, etc. An important component of the public process is the ability of all people currently providing all types of transportation services to oppose the proposed changes to the industry on various grounds, including that there is an excess of equipment in the province. These opposing parties are entitled to be heard at a public hearing before the Board grants any changes to the industry. The Board notes this is the first issue listed under s. 13 for its consideration.

[45] It is against this background that the Board must then interpret the objects and intent of the legislation in providing for temporary authorities under s. 9 of the *MC Act*.

[46] In contrast to the above, in a temporary authority application there is no public process. There is no advertisement of the application in the Royal Gazette or elsewhere. There is no ability for the public and/or other carriers or transportation operators to appear before the Board in a public hearing to oppose the changes to the industry. This *ex parte* process is only permitted under the *Act*, if the carrier can prove to the Board's satisfaction that there is an "immediate or special need" which requires the services.

[47] The *Canadian Oxford Dictionary*, Second Edition, 2004, defines these terms as follows:

immediate 1 occurring or done at once or without delay (*an immediate reply*). ... 3 most pressing or urgent; of current concern (*our immediate concern was to get him to the hospital*).
...

special 1a particularly good; exceptional; out of the ordinary (*bought them a special present; took special trouble*). **b** peculiar; specific; not general (*lacks the special qualities required; the word has a special sense*). ... [Emphasis added]

[48] The Board adopts the following obiter statement in the 2001 *Trius* decision that a temporary authority is “an exceptional measure to enable a prompt response to unusual circumstances” [emphasis added]. An “immediate” need may include the “unexpected” (*ibid*, para. 42). As defined in the *Oxford Dictionary*, “immediate” also includes a “pressing” need; and “special” includes services that are “out of the ordinary”. An example of an immediate or special need is the influx of buses required to assist immediately after the Swiss Air disaster.

[49] Another important requirement of legislation interpretation is that the *MC Act* is to be interpreted as “always speaking” (s. 9(1) *Interpretation Act*), meaning that it is to meet the objects and intent of the *MC Act* in its present day context as the industry evolves, *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559; and *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807.

[50] The Board has, for the first time in this hearing, heard evidence from Absolute on the significant changes which have occurred to the motor coach charter industry over the last few years.

[51] To understand the significance of this evidence, the Board will provide some background information about the industry, how temporary authorities have been issued in the past, and why and how this new evidence impacts the application of the provisions dealing with temporary authorities to meet the objects of the *MC Act* and the needs of today's public in Nova Scotia.

[52] Initially, the motor carrier industry had a limited variety of vehicle styles and types. There were buses used for schools and early highway coaches with few, if any, different vehicles in between. By the 1980s manufacturers were building a number of different sizes and styles of vehicles. At this time, the bulk of the charter services provided by the carriers were for customers hiring a coach for multi-day tours. The customer chose all aspects of the individualized service, including the groups itinerary and the vehicle the group wanted to use. As customers desired their services to be offered specifically by different sizes and types of vehicles, services became vehicle specific. That is, each separate style and size of vehicle was considered to be offering the public a different service. This was particularly the case in urban areas like Halifax Regional Municipality ("HRM") from which most of these multi-day tours originated. Consequently, in accordance with the industry and the public need for charter services at that time, the Board interpreted the *MC Act* services as being vehicle specific.

[53] The implications of this interpretation of services, generally meant that if a carrier wished to oppose an application pursuant to s. 13(a) claiming there was "an excess of equipment", the Board typically required the carrier to show it had the same or similar type of specific vehicle. For example, if a carrier wished to oppose an applicant seeking

to bring double decker buses into the charter market, the carrier had to also operate double decker type buses.

[54] Temporary authorities were similarly interpreted. If a carrier was bringing a unique vehicle into the province, the service to be provided by that vehicle was considered “out of the ordinary” or “special”. A temporary authority would often be granted as a carrier’s permanent license application was proceeding through the public hearing process. Consequently, a carrier would often purchase a unique vehicle and receive a temporary authority while applying for its permanent license. All understood, however, that the temporary authority gave no presumption that the permanent license would be granted, as specified in s. 9(2) of the *MC Act*.

[55] The Board finds, as Absolute’s evidence confirmed in this hearing, that there has been a significant change in the charter motor coach industry in the Province of Nova Scotia over the last few years. Its evolution affects both the services and the types of vehicles being operated to supply those services. In turn, this will affect how the Board interprets the *MC Act*, in particular s. 13 and 9.

[56] In 2010, the Board finds the bulk of the charter business in the province has switched from multi-day tours to providing pre-packaged tour transportation services to cruise ship customers. The cruise ship lines do not charter the coach. Rather, the carrier offers pre-packaged services such as Absolute’s city hop-on hop-off tours, or the half-day Peggy’s Cove/half-day city tour. Individual tickets are sold by the cruise ship lines to its passengers.

[57] Most importantly, the Board finds the vehicles providing these pre-packaged tour transportation services include every type of vehicle able to do charter services in Nova Scotia, from school buses to highway coaches and every vehicle in between.

[58] The Board notes that Absolute has been a witness in a number of cases before this Board supporting the applications of carriers to receive licenses and/or amendments to operate many different types of vehicles, including semi-coaches, as Absolute would utilize those coaches for the cruise ship passengers. For example, Absolute supported the application of *Mac Tours Inc.*

[59] Mr. Smellie stated that some cruise ship lines it services do not wish to use semi-coaches this year. The Board does not find, for the reasons noted below, that semi-coaches will not be used by these cruise ship lines for these pre-packaged tour transportation services. The Board also does not accept this as evidence that there is therefore an immediate or special need for the issuance of temporary authorities for the vehicles of Absolute. Historically, cruise lines have used every vehicle available to provide tours to its passengers rather than have them remain idle on the ship, particularly, when there are 12,000 cruise passengers in port at one time. Their use of every type of vehicle happens at any port, especially when 12,000 cruise passengers are present. The Board has repeatedly noted that the motor coach industry is not able to provide specific coaches when 12,000 passengers are in port on one day. Furthermore, although cruise ship lines have requested specific types of vehicles, historically, the passengers have enjoyed the tours regardless of the vehicle and in some cases even found a school bus nostalgic. Due to this history, the Board will require evidence from the passengers, and the vehicles the

cruise lines actually use during the season as opposed to their desires and wants. Finally, the Board notes the *MC Act* refers to “suitable equipment” not exact equipment, s.13(a).

[60] In essence, the Board finds the motor coach charter industry has evolved and that different types, styles, sizes, and/or models of vehicles are not, in and of themselves, a separate distinct service being offered to the public. Rather, the services being offered are the pre-packaged tours operated by all different types of licensed vehicles.

[61] The *Interpretation Act* also requires the Board to consider the consequences of a particular interpretation to determine if it meets the objects of the legislation (s. 9(5)(f)). Today there are endless choices of different vehicle styles, types, and seating capacities. If each different vehicle were considered a different service the Board finds this would flood the province with excess equipment, even though all are providing pre-packaged tour services. This result is contrary to the objects of the *MC Act*. The Board finds the objects of the *MC Act* are met when services are determined by the type of transportation, which in this case, is pre-packaged tour services.

[62] As the pre-packaged transportation services are provided by every type of vehicle, any carrier providing these services has the right to oppose the permanent amendment applications of Absolute regardless of whether the carrier owns or operates a double decker buses and/or Prevost articulated coach. In the context of the current charter industry, as described in this hearing, which uses every type of vehicle for each service, the Board considers it appropriate that notice be given to all of the carriers in the province with charter licenses of Absolute’s amendment applications and to allow them to

be heard before the Board permits an additional 1,200 passenger seats to operate in the province.

[63] Similarly, when considering a temporary authority application under s. 9, the Board finds different sizes, styles or makes of vehicles are no longer offering a unique or out of the ordinary service as all types of vehicles are now generally considered to be offering the same or similar services to the public. As the vehicle itself no longer provides a special service, the Board will no longer issue a temporary authority solely because it offers a different style coach.

VI CONCLUSION

[64] The Board finds all applications are to be processed through a public hearing in which members of the public and others providing transportation services have the opportunity to appear and be heard by the Board before it decides to approve any changes to the motor coach industry. It is only in those immediate cases that are completely unexpected, or in those unique and rare cases which happen for a short period that a temporary authority will be issued by the Board.

[65] The Board further finds that under the circumstances of this case, Absolute has failed to show that there is an immediate or special need for these 18 vehicles to provide all types of charter services in Nova Scotia or extra-provincially for 90 days. The Board permitted Absolute to move the eight double decker vehicles to New Brunswick and permit driver training on the articulated coaches, otherwise the application was denied.

Any other use of these vehicles would have to wait until the completion of its applications to amend its permanent licenses.

DATED at Halifax, Nova Scotia, this 2nd day of September, 2010.

Dawna J. Ring