

NOVA SCOTIA COURT OF APPEAL

Citation: *Fu (Pengbo's Shuttle) v. Absolute Charters*, 2020 NSCA 83

Date: 20201203

Docket: CA 499735

Registry: Halifax

Between:

Pengbo Fu o/a Pengbo's Shuttle

Appellant

v.

Absolute Charters, Coach Atlantic, Transoverland, Attorney General of Nova Scotia and the Nova Scotia Utility and Review Board

Respondents

Judge:

The Honourable Justice Peter M. S. Bryson

Appeal Heard:

December 3, 2020, in Halifax, Nova Scotia

Subject:

Motor Carrier Act; Utility and Review Board Act; Appeal of dismissal of application to amend motor carrier license

Summary:

Pengbo Fu appealed dismissal of its application to expand its bus charter services, claiming the midsize market was not properly serviced and that granting the license sought would not compete with larger carriers. The Board found that there was excess capacity in the market and denied the application.

Issues:

- (1) Did the Board err by finding there is an excess of equipment and adding equipment would negatively impact other carriers?
- (2) Did the Board err by failing to give adequate weight to the public interest in having a midsize passenger vehicle option?

Result:

Appeal dismissed. There was evidence to support the Board's factual findings. The *Act* precluded an appeal from findings of fact. The Board made no error of law.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 5 pages.

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Scotia and the Nova Scotia Utility and Review Board

Respondents

Judges: Bryson, Scanlan and Bourgeois, JJ.A.

Appeal Heard: December 3, 2020, in Halifax, Nova Scotia

Written Release: December 9, 2020

Held: Appeal dismissed, per reasons for judgment of Bryson, J.A.;
Scanlan and Bourgeois, JJ.A. concurring

Counsel: Pengbo Fu, appellant in person
Mary Dempster, for the respondent Absolute Charters
Ryan Cassidy, for the respondent Coach Atlantic
Craig Carabin, for the respondent Transoverland
Edward A. Gores, Q.C., for the Attorney General of Nova
Scotia (not participating)
Bruce Outhouse, Q.C., for the Nova Scotia Utility and Review
Board (not participating)

Reasons for judgment:

[1] After hearing from Mr. Fu on behalf of the appellant, the panel dismissed the appeal with reasons to follow. These are the reasons.

Introduction

[2] Pengbo Fu operates Pengbo's Shuttle, based in Sydney, Nova Scotia. Mr. Fu filed applications with the Nova Scotia Utility and Review Board (the "Board") seeking to amend its motor carrier license to add province-wide charter authority for charters beginning in Cape Breton to mainland Nova Scotia and return, with the exception of Cape Breton cruise ship passengers. Mr. Fu wanted authority to provide backup for cruise ship passengers for various identified tour operators. He also sought to amend his extra-provincial operating license to add charter authority to carry passengers from Cape Breton to any point in Newfoundland, Prince Edward Island, Quebec, Ontario, and Maine, and return.

[3] Mr. Fu operates a 28-passenger bus. He submitted to the Board that there was a need in the Cape Breton market for a midsize vehicle option. He led evidence that this market was inadequately serviced by existing operators, which typically operate much larger buses, accommodating 48 passengers or more.

[4] Before the Board, Mr. Fu's applications were opposed by Coach Atlantic Transportation Group Inc., Absolute Charters Inc., and Transoverland Limited. In brief, they argued that there was an excess of capacity in the charter market and that Mr. Fu's applications should be denied to ensure sustainability of existing carriers.

[5] The Board agreed with those opposing Mr. Fu's applications, finding that there was an excess of equipment capacity in the charter market and that adding new equipment would negatively impact other licensed carriers.

[6] In his Factum, on which he elaborated in articulate oral submissions, Mr. Fu raised two fundamental issues:

Issue I: Did Mr. Roland A. Deveau [the Board] misapprehend the facts and err in law when he determined there is an excess of equipment in the existing charter market [sic] and that adding new equipment would negatively impact other licensed carriers?

Issue II: Did Mr. Roland A. Deveau [the Board] err in law and fact by failing to give adequate weight to the public interest in having a midsize passenger vehicle option?

This Court's Authority on Appeal

[7] An appeal to this Court from a decision of the Board is confined to questions of law or jurisdiction. Section 30 of the *Utility and Review Board Act*, SNS 1992, c. 11, says:

Appeal

30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board **upon any question as to its jurisdiction or upon any question of law**, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.

[...]

[Emphasis added]

[8] The Court of Appeal has no authority to overturn findings of fact by the Board. Section 26 of the *Utility and Review Board Act* says:

Effect of finding

26 The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.

Issue 1: Did the Board err by finding there is an excess of equipment and adding equipment would negatively impact other carriers?

[9] Mr. Fu argued strongly that the Board had erred in its assessment of his evidence that the midsize market was not properly served by existing operators. Because he felt that he was not competing directly with larger operators, he argued that his business would not have a negative impact on those operators. Unfortunately for Mr. Fu, the Board did not accept this argument:

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

there is an excess of equipment capacity in the local charter market. Adding the new charter authorities would just add to that overcapacity.

[Emphasis added]

[10] Because the first issue is a question of fact, this Court has no authority to re-consider it.

Issue 2: Did the Board err by failing to give adequate weight to the public interest in having a midsize passenger vehicle option?

[11] Mr. Fu’s Factum says that the Board’s “failure to give weight to the public interest” arose because it “... failed to properly consider the letters of support ... and the testimony proffered ...”

[12] The Board addressed public interest:

[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?*

[Emphasis added]

[13] The Board considered the “testimony proffered” and the “letters of support” submitted by Mr. Fu, but was not persuaded by either:

[61] The Board also has concerns about the evidence presented by Mr. Fu in support of his applications. *Much of the evidence he presented was general and anecdotal in nature, lacking the concrete type of evidence that the Board would expect be provided to support of such applications.* Except for the evidence of Cabot Discovery Tours, and possibly Gateway Taxi, there was no evidence of actual business that could be referred to Pengbo’s Shuttle. *Mr. Fu did not identify any potential new business or provide confirmation that clients had been unable to hire other carriers and needed more carriers in the market.* Arguably, Mr. Fu did offer an example as [sic] Basketball Cape Breton, but Transoverland cast significant doubt on whether that client was a reasonable prospect. *A number of the letters of support were not from prospective clients at all, but were from governmental bodies or economic development organizations, like the Municipality of Victoria, Destination Cape Breton Association, and the Cape Breton Partnership. Such organizations clearly support local business*

initiatives, but are unable to comment on the balance the Board has to find under the *MC Act* to ensure a sustainable motor carrier industry in the local market. Further, as noted above, *three letters of support were later effectively withdrawn* (Bannockburn Tours, Highlanders basketball team and CBRM).

[Emphasis added]

[14] In response to a question from the Court, Mr. Fu was not able to identify an error of law made by the Board, other than to suggest that it had failed to consider sustainability. In fact, the Board did consider sustainability:

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

[Emphasis added]

Conclusion

[15] Despite his very able written and oral submissions, Mr. Fu could not identify an error of law by the Board. Because appeals to this Court are limited to questions of law and jurisdiction, we cannot interfere with the Board's decision in this case. Accordingly, the appeal is dismissed, without costs.

Bryson, J.A.

Concurred in:

Scanlan, J.A.

Bourgeois, J.A.