MANITOBA

Order No. 93/11

THE HIGHWAYS PROTECTION ACT

July 18, 2011

Before: Graham Lane, C.A., Chairman
Susan Proven, P.H.Ec., Member

APPEAL OF A HIGHWAY TRAFFIC BOARD DECISION: PROVINCIAL TRUNK HIGHWAY 5, RURAL MUNICIPALITY OF STE. ROSE

1.0 Summary

By this Order, The Public Utilities Board (PUB or Board) declares Highway Traffic Board's (HTB) decision granting Permit No: 161-10 to Delaurier Farms Ltd. (Delaurier) a nullity and of no effect. There were defects in HTB's process, and, as a result, the PUB will not consider the appeal.

2.0 Background

In April 2010, Delaurier applied to HTB for approval of a change in the use of one of its driveways, that to move from agricultural to residential. HTB held a hearing on June 16, 2010 in Dauphin, Manitoba.

HTB denied Delaurier's application for a change in use of the north driveway, as sought by Delaurier, but approved the use of its southerly access driveway to joint agricultural/residential. The decision was subject to the removal of the north driveway, and a Declaration of Right-of-Way being drawn up and registered with the Land Titles Office with respect to the south driveway. HTB communicated its June 16th decision orally to Ms. Tracy Delaurier.

Subsequently, Mr. Rick Delaurier contacted HTB requesting that HTB reconsider its June 16th decision. On June 30th of 2010, HTB held a hearing in Brandon before a different HTB panel. Submissions to the HTB were presented by Mr. Rick Delaurier for Delaurier and the Department of Manitoba Infrastructure & Transportation (MIT). Subsequently, in a letter dated August 27, 2010, HTB issued Permit 161-10 to Delaurier approving the change in use of the access driveway from Agricultural to Residential.

On September 27, 2010 MIT appealed HTB's decision to PUB.

Counsel for MIT requested, agreed to by counsel for Delaurier, that the hearing proceed by way of written submissions, and indicated an intention to argue that the amended permit should be declared a nullity.

Written responses were received from counsels for Delaurier and MIT.

3.0 Applicant

Counsel for Delaurier wrote on July 18, 2011 to confirm that it takes no position on the preliminary issue, that being as to whether nullity should be declared.

4.0 Manitoba Infrastructure and Transportation

Counsel for MIT submitted a brief of argument on the preliminary issue as to whether the HTB's failure to follow the proper process leading to the amended permit made it a nullity.

MIT took the position that HTB's June 30, 2010 decision and subsequent issuance of a permit is a nullity. MIT submitted that the June 30, 2010 hearing/decision was not a continuation of the June 16, 2010 hearing, as it was held before a different HTB panel. The June 16, 2010 decision was the final decision of HTB. As well, MIT submitted that HTB does not have the statutory power to reconsider a final decision. MIT submitted that should a party be dissatisfied with a HTB decision, the Legislature has provided a statutory remedy, that being an appeal by way of a de novo hearing of the PUB.

MIT submitted that the doctrine of *functus officio* applies to administrative tribunals. This means that a tribunal may not reopen its proceedings once it has reached a final decision. This doctrine does not apply where the tribunal is authorized by statute to reopen its proceedings. *The Highways Protection Act, (HPA)* from which the HTB derives its authority does not contain such provisions. Further, once HTB has heard the matter and has communicated a decision orally, as it did soon after its June 16, 2010 hearing, there is nothing left for HTB to do. Issuing a permit is an administrative step, necessary to give legal effect to HTB's decision. HTB is *functus officio* as soon as it makes a decision, and not when that decision becomes legally effective.

MIT noted that HTB's records indicate that HTB made a final decision on June 16, 2010. The notes of June 16, 2010 indicate denial of the Change the Use of Access Driveway (Agricultural

to Residential) and approval instead of Change the Use of Southerly Access Driveway to Joint Use (Agricultural/Residential).

MIT noted further the language used in the HTB's "Additions Agenda" for June 30, 2010, which describes the Delaurier proceedings in the following manner:

> *"For the Applicant's attendance for the Board to reconsider their decision of June 16, 2010. (emphasis added)"*

MIT noted that the second hearing was held in front of a different panel and submitted that if the first hearing did not result in a final decision, (which MIT submits it did), it follows logically that the original panel retained jurisdiction over the matter. The fact that HTB used a different panel reflects an understanding that the first panel had already rendered a decision and was no longer seized of the matter.

MIT noted Board Order 110/10 which stated: *"It is a well defined principle of administrative law that "he who hears must decide", such that if a panel is constituted and its process for decision is underway, a new panel ought not be constituted in the middle of the decision making process."*

MIT noted that administrative tribunals are subject to the *functus officio* doctrine, with two exceptions: Where there has been a clerical error or slip in drawing up the decision, a tribunal may correct that error (this does not apply on the facts of this case). Secondly, an administrative tribunal may be empowered by its enabling statute to reconsider its decisions in other circumstances. However, there is nothing in the HPA granting explicit authority to HTB to reconsider its decisions.

In summary MIT requests that this Board find that:

1) HTB was *functus officio* with respect the June 30, 2010 hearing;
2) HTB had no authority to reconsider the June 16, 2010 Decision:
3) the June 16, 2010 decision of HTB was a final decision; and

4) HTB's June 30, 2010 decision and subsequent permit are nullities.

MIT submits that the second decision and Permit No: 161-10 are a nullity, and, as a result, the PUB does not have jurisdiction to consider the appeal on its merits.

6.0 Board Findings

The PUB accepts the submissions of MIT and concludes that HTB's decision is defective and, accordingly, Permit 161-10 is a nullity.

HTB arrived at a decision on June 16 and communicated that decision to the Applicant soon thereafter. The PUB finds that HTB was *functus officio* with respect the June 30, 2010 hearing once the decision was made, and that the decision was a final one from which the Applicant had a right of appeal.

When the Applicant requested a review and or further consideration, the Applicant should have been advised by HTB to seek a remedy through the appeals process available through the PUB.

That advice is normally given on written decisions of HTB, however, in this case HTB's decision was given over the telephone. The PUB finds that the Applicant was given incorrect advice concerning his rights to Appeal. The PUB also notes that there are no provisions in the HPA which gives HTB authority to re-open and reconsider an earlier proceeding. Reconsideration of a matter goes by way of a hearing de novo to this Board.

The PUB therefore finds that the decision of HTB under appeal is a nullity at law and the PUB cannot consider the appeal on its merits. If the applicant wishes to proceed, the requirements of The HPA must be met, and HTB must proceed through its process to carry out its duties in accordance with the law on a new application.

The PUB further notes, as it has done on a previous occasion and as submitted by MIT, that there were different panel members present for consideration of the matter for the second meeting of

the HTB. It is clear from the record that one panel had already started the decision making process and rendered a decision communicated orally to the applicant.

It appears that HTB viewed the second (August 21) meeting as a continuation, as the Agenda of the second meeting speaks of a reconsideration of the Decision of June 16. Putting aside the fact that HTB does not have the statutory authority to review its own decision, HTB failed to observe a well defined principle of administrative law that "he who hears must decide", such that if a panel is constituted and its process for decision making is underway, a new panel ought not be constituted in the middle of the decision making process.

The PUB does find in this case that such a defect occurred, given the record and the submissions before it. The PUB is concerned that not all individuals who appear before the HTB may be aware of the rules of natural justice, and so may not be aware when their rights are violated. As an administrative tribunal HTB has an obligation to ensure that the rights of the individuals are preserved by ensuring that proper procedures are always observed.

Sadly, this is the third occasion on which a defective process has occurred, the others discussed in PUB Orders 134/08 and 110/10.

This Board strongly suggests HTB obtain the services of legal counsel to provide training on matters of administrative law and process to HTB, and that manuals be developed for staff so as to avoid further denials to citizens of their rights.

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure (Rules). The Board's Rules may be viewed on the Board's website at www.pub.gov.mb.ca.

7.0 IT IS THEREFORE ORDERED THAT

1. Permit No: 161-10 of the Highway Traffic Board is a nullity and of no force or effect.

2. If the applicant chooses to proceed with a fresh permit application he may do so and the provisions of *The Highways Protection Act* and *Regulations* are to be followed respecting the permit process.

THE PUBLIC UTILITIES BOARD

"GRAHM LANE, CA"
Chairman

"H. M. SINGH"
Secretary

Certified a true copy of Order No. 93/11
issued by The Public Utilities Board

Secretary