

MANITOBA

Order No. 169/09

THE PUBLIC UTILITIES BOARD ACT

December 16, 2009

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

AVION SERVICES CORPORATION
AIRPORT SHUTTLE SERVICE

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Summary

By this Order, the Public Utilities Board (Board or PUB) varies Board Order 137/09.

The conditions placed on the conditional approval provided Avion Services Corporation's (Avion), to operate an airport/downtown hotel fixed-fee shuttle service, pursuant to a City of Winnipeg (City) resolution establishing an agreement between the City and Avion, are amended.

The Board varies the conditions established in Order 137/09 to, as follows:

1. Directive 1.c:

That, on the understanding that Avion will immediately file its latest financial statements with the Board, Avion will, on or before April 1, 2010, provide the Board with a written undertaking that, upon final approval being provided by the Board, it will operate the shuttle service for at least one (1) year and exercise its best efforts to continue to operate the service for at least a further two (2) years thereafter.

2. Directive 1.d:

On or before April 1, 2010, Avion will provide the Board with written confirmation of Avion's agreement with WAA regarding the planned design and commitment to implement signage and other information particulars within and outside the airport terminal, satisfactory to the Public Utilities Board, setting out the various ground transportation means available to persons leaving the airport terminal and the expected price or range of prices for such services and, further, Avion will cause a copy of the written Agreement to be entered into between Avion and the WAA to such effect to be filed with the Board before commencing the airport shuttle service.

3. Directive 1.e:

On or before April 1, 2010, Avion will provide the Board with written confirmation of Avion's agreement with WAA regarding assurance that the current ratio at terminal curb between taxicabs and executive cars (that being 4

cabs for each executive car) will not change without the approval of the Public Utilities Board and that if there is any intention to alter that ratio, WAA will provide Avion with reasonable notice thereof, with a view to obtaining the approval of the Public Utilities Board relative thereto. Further, Avion will cause a copy of the written Agreement to be entered into between Avion and the WAA to such effect to be filed with the Board before commencing the airport shuttle service.

Relative to the substantial variance of condition 1.c. of Order 137/09, the basic premise is that if Avion lost money in the first year, with no reasonable chance of operating profitably thereafter, it should be able to cease operations. The second premise supporting the Board's variance is that a cessation of the proposed shuttle service a year following its inauguration would not be opposed by Unicity/Duffy's.

Order 137/09 required that if the shuttle service began, that Avion would operate the service for a minimum of three years. The Board set that initial condition on the basis that it would not be in the public interest for Avion to start the service, materially changing the airport ground transportation, to the detriment of the taxicab industry only to then soon discontinue the service.

However on reconsideration, the Board concludes that such a situation would not detrimentally affect the taxicab industry; in fact, the Board suspects that the taxicab industry, and certainly Unicity/Duffy's, would welcome the cessation of Avion's shuttle business, assuming it began.

Regarding condition 1.d. of Order 137/09, the variance, while placing the onus on Avion rather than the Winnipeg Airport Authority (WAA), essentially maintains the Board's requirement for signage not being preferential in any manner, with WAA's commitment

required pursuant to Order 137/09 being instead, to be incorporated in Avion's to-be-developed agreement with WAA.

As for condition 1.e. of Order 137/09, the Board's ratio requirement, taxicabs to executive cars, remains intact with the variance, similar to the approach taken with the variance to condition 1.d. of Order 137/09, simply transferring the responsibility from WAA to Avion, which will be required to enter into an agreement with WAA that will provide for the ratio sought by the Board.

It is the Board's understanding that with the new terminal, the curb space for all ground transportation will be expanded, which will allow for the 4:1 ratio to remain in place. The Board expects that the existing and proposed curb space plans will form part of the Agreement between Avion and WAA.

With the above variances in place, ahead of Avion commencing its service:

- a) Avion must file its most recent annual audited financial statements and an updated business plan with PUB, for PUB's approval ahead of Avion's service commencing;
- b) Avion must provide PUB with written assurance that upon commencing its shuttle service, that service will continue uninterrupted for at least one year, and provide the Board with sufficient evidence that Avion has the financial means and intention of operating the shuttle for at least three years (subject only to the ability of the City to cancel its agreement with Avion with ninety days notice);
- c) Avion must have entered into, and filed with PUB, an agreement with WAA, the sole owner of Avion, that provides for:
 - i) the implementation and maintenance of signage and other information particulars within and outside the airport terminal that meet PUB's approval, setting out the various ground transportation means available to persons

leaving the airport terminal, and the expected price or range of prices for such services; and

- ii) the maintenance of the current ratio of taxis to executive cars at the terminal curb (that being no less than 4:1, taxis to executive cars), awaiting travelers departing from the airport.

As well, PUB reaffirms its recommendation of Order 137/09, in keeping with the spirit and intent of Order 137/09, that the Manitoba Taxicab Board (TCB) hold a public hearing to review the implications of Avion's shuttle service, taking into account the findings and issues set out in Order 137/09, as now varied, and consider increasing Winnipeg taxi fares.

TCB would best proceed with its public hearing and issue its decision(s), with reasons, in sufficient time so as to be ahead of the commencement of Avion's proposed service.

With respect to Avion's revised business plan, which must be filed with PUB and approved by PUB, it is not to provide for any additional shuttle vehicles or shuttle "runs" beyond those proposed in the application heard by PUB. As well, once its service has commenced, Avion may not materially vary any element of its service (number of vehicles, schedule, destinations, pricing, etc.) without first obtaining PUB's approval.

The Board reaffirms its expectation that, given PUB's final approval, Avion's airport-downtown hotel shuttle service is to commence no earlier than April 1, 2010 and no later than July 1, 2010. Following commencement of its service, Avion is to file annual audited financial statements with PUB, segmenting the shuttle service, and its shuttle service is to be subject to tri-annual reviews by PUB.

This Order should be read in conjunction with Order 137/09, which provides considerable detail with respect to Avion's proposal to operate an airport/downtown hotel shuttle service, and related matters.

PUB continues to conclude that Avion's airport-downtown shuttle service will negatively impact on the annual volumes and revenue of the taxi industry's "to and from the international airport" fares and, in the absence of a fare increase (which requires TCB approval), expects the average taxicab will note reductions in both gross and net income.

The reviews of Avion's proposal, conducted first the City and more recently by the Board, allowed the Board to obtain a sufficient understanding of the pros, cons and risks of Avion's proposal such as to allow for the directions and suggestions made within Order 137/09 as now varied.

Avion must file the additional information required by the Board and receive the Board's final approval prior to commencement of the shuttle service. And, while PUB calls on and anticipates that TCB will hold a public proceeding to review the implications of Avion's shuttle service for the taxi industry, and other related matters raised herein, ahead of PUB giving final approval for the shuttle service to commence, the Board cannot and does not require TCB to do so.

Notwithstanding whether or not TCB holds such a public hearing, PUB will give serious consideration to Avion's expected new filings, and if judged adequate and in the public interest, will provide final approval for Avion to commence the shuttle service to and from downtown hotels.

PUB does not envision an oral public hearing following the filing of the additional submissions required of Avion, although it will allow Unicity Taxi Ltd. and Duffy's Taxi (1996) Ltd. (Unicity/Duffy's or the taxi companies) to provide comments on Avion's filings prior to reaching a final conclusion allowing the commencement of the service.

The delays and costs experienced related to Avion's application have been significant, and PUB is not of the view that incurring significant additional costs through another oral public hearing process, following the expected additional filings of Avion, would serve the public interest. That said, that decision will depend on the filings and Unicity/Duffy's position.

1.0 Introduction

Preamble

The major parties involved, directly or indirectly, in PUB's review of Avion's application were Avion, WAA, Unicity/Duffy's, other elements of the taxi industry, the City of Winnipeg, TCB, downtown hotels and the public interest.

Order 137/09 followed a public hearing wherein the taxi companies opposed Avion's proposed shuttle service.

Avion and the Winnipeg Airport Authority

Avion first approached the Manitoba Taxicab Board (TCB) for approval of a proposed fixed fare airport/downtown hotel shuttle service. Following rejection of its application by TCB, Avion proceeded to seek an agreement with the City of Winnipeg, and, following Avion's success in that initiative, the enterprise sought PUB's approval.

Avion (a wholly-owned subsidiary of WAA) seeks to operate a shuttle service between the Winnipeg International Airport (James Armstrong Richardson International Airport, or airport) and downtown hotels, with a stated expectation that local area hotels (near the airport) may be added to the service in the future.

At the time of PUB's hearing of Avion's application, Avion's board of directors was comprised of two senior WAA executives. Avion operates and/or oversees a number of services provided by airports, and, with the agreement of its board and a management committee of WAA, prepared a rudimentary business plan and sought approval to commence service.

WAA has contracts with Unicity and limousine operators. WAA's recent agreement with Unicity was entered into in late 2008. Limousine operators also have contracts with WAA – limousines include "executive" cars as well as stretch limousines.

Manitoba Taxicab Board and The Taxicab Act

The Taxicab Act established TCB for the purpose of licensing and overseeing the operation of taxicabs (including taxis, Handivans, limousines and a category of limousine, executive cars) in the City of Winnipeg.

The Taxicab Act provides for regulations “*respecting any matter the board considers necessary or advisable to carry out the intent and purpose of th(e) Act*”.

TCB heard Avion’s application on March 8, 2006, and, as previously indicated, rejected it. And, no detailed reasons were released in support of TCB’s conclusion that Avion’s application did not meet a public service need; TCB simply advised Avion that its application “was denied”.

During the proceeding, PUB suggested that TCB, on the premise that Avion’s application was approved and the firm commenced its proposed shuttle service, take the new service into account when considering future applications for additional taxicab licenses.

City of Winnipeg

Subsequently, and still in 2006, following TCB’s rejection of its application, Avion approached the City, pursuant to Section 163 of The City of Winnipeg Charter (Charter), which, in subsection 3, states in part:

“... where a person wishes to provide a local transportation service that falls under the exclusive authority of the city ... and the person is not providing the service for or on behalf of the city, the city may, at the person’s request enter into an agreement with the person under which the person will operate a local passenger transportation service of such kind and in such part of the city as is specified in the agreement; but (a) before beginning to operate the service the person must obtain from The Public Utilities Board approval of the agreement and be authorized by that board to operate a local transportation service in the city; and (b) the operation of the service is, in all respects, subject to the authority and supervision of that board.”

Section 162(1) of the Charter provides the City of Winnipeg Council authority to “*pass by-laws respecting local transportation systems and chartered bus services*”, and Section

163(1) provides the City with “*exclusive authority to operate fixed fare passenger transportation services within the City except ... b) taxicabs and school buses ...*”.

Subsequent to Avion approaching the City, TCB advised the City that TCB lacked jurisdiction and accordingly, did not oppose (took no position) Avion’s application to the City.

Avion’s agreement with the City includes requirements that the shuttle service:

- a) be restricted to carrying passengers between (the airport) and hotels in the City;
- b) charge a minimum fare at least 4 times the regular fare for Winnipeg Transit and Handi Transit;
- c) is prohibited from using stops used by either Winnipeg Transit or Handi Transit;
- d) comply with safety standards/requirements;
- e) carry a minimum of \$5.0 million of liability insurance, with a provision to protect the City;
- f) be operated by Avion (the service not to be assigned or sublet without the consent of the City’s Director of Transit); and
- g) operate subject to the condition that it may be cancelled by the City without compensation (to Avion) upon 90 days of advance notice.

From the evidence, the City’s interest in the shuttle is based on three factors:

- a) Winnipeg Transit’s forecast that Avion’s shuttle service would not reduce Winnipeg Transit’s ridership;
- b) support for Avion’s proposal from the hotel and tourism industry; and
- c) the City’s general interest in business development and tourism.

Acting in accordance with the expectations of the City, as set out in City Council’s resolution, and in response to comments made by the Mayor of the City at the time of the

resolution's passing, calling on PUB to hold a public hearing (and take particular notice of the implications for taxi owners and drivers), Avion filed an application with PUB in 2007.

The Public Utilities Board

Following the receipt of Avion's application, PUB advised of an intention to hold an oral public hearing which would be preceded by the publication of a Notice of Hearing. After PUB rejected Avion's arguments that, given the firm's agreement with the City and the five public meetings held by the City ahead of the agreement, a public hearing before PUB was unnecessary and too costly, the applicant suspended its application for approximately a year and a half.

Subsequently, Avion renewed its application with PUB and filed additional information in response to PUB's request. At the public hearing, PUB received evidence from Avion's, WAA's, Unicity's and Duffy's witnesses brought forward by the parties, as well as the Executive Director of TCB – the TCB Executive Director being a witness brought forward by PUB. Albeit not of evidentiary value, presentations were also made to the Board by individuals that were representative of the taxi industry, limousine and executive car operators, and the Manitoba Hotel Association.

Winnipeg's Taxi Industry

Winnipeg's taxi industry is comprised of taxicabs; executive cars and limousines.

Taxi companies enter into agreements with property owners (including hotels and the international airport) allowing taxicabs from a particular firm to pick-up passengers at a property owner's address. These agreements generally involve terms that provide for concession fees for the exclusive right to pick-up passengers at a particular address.

TCB has licensed 409 taxicabs to operate in Winnipeg (the number of taxi licenses granted by TCB has not materially changed since 1946, when 400 taxis were licensed). Almost all "regular" (non-seasonal) taxis are associated with one of three dispatch

companies – Unicity, Duffy’s and Spring. Taxicabs associated with Unicity and Duffy’s represent approximately 95% of the 409 licenses. Unicity and Duffy’s are cooperatives, owned by, generally, incorporated taxi firms. Many of the incorporated taxi firms have more than one owner, and each taxi is generally “on the road” in service on a virtually 7/24/365 basis.

The Board understands that Unicity operated an airport-downtown shuttle service approximately thirty years ago; neither the duration of that service nor the regulatory framework, if any, that applied, or the rationale for beginning or ending the service, were known to either Avion or the taxi companies appearing at the hearing. The same lack of information applies as well for a Greyhound shuttle that apparently operated at or about the same time.

James Armstrong Richardson International Airport and the Winnipeg Airport Authority

The airport is served by a variety of ground transportation services; these include taxicabs, executive cars and limousines. Each of these modes of transportation are both regulated by TCB and, with respect to the airport, subject to agreements entered into with WAA.

On November 13, 2007, during the period of Avion’s suspension of its application to PUB, WAA and Unicity announced a three-year contract pursuant to which Unicity is to be the exclusive provider of taxicabs at the airport (the new contract has a term extending from January 1, 2008 to December 31, 2010).

Until earlier this year, stretch limousines served the airport from a curb location (just outside the terminal), similar to the positioning of taxicabs. By a unilateral decision of WAA, the limousines were ‘relocated’ to a different location outside of the terminal, reducing substantially their opportunities for gaining fares.

In an effort to “compensate” limousine owners for their loss of business due to the “move away from the curb” (the investment in a stretch limousine by a limousine owner was

reported to be in the area of \$140,000), TCB provided the owners with 30 additional executive car licenses, bringing the number of executive cars serving the airport to 46, from 16.

It remains the Board's view that while assisting limousine owners, the increase in executive car service at the airport has negatively affected the volume of taxicab trips from the airport. That said, WAA advised that the present alignment of taxis and executive cars at the terminal curb is in the ratio of 4 taxis to each executive car.

Importance of Avion's Application

Avion's application is important to Avion and its parent company, WAA, just as it is important to all elements of the taxi industry. The matter is important to the taxi industry in general because "to and from" airport trips represent the largest single component of the industry's overall annual trip volume (approximately 250,000 annual trips from the airport and perhaps a similar number of trips to the airport, out of an estimated total annual trip volume in the range of 3 million for the entire taxicab fleet). In short, perhaps 1/6th of annual taxicab fares are related to airport service, with this service representing the largest component of annual taxicab fares.

The operation of Avion's shuttle service was expected to reduce overall taxicab trips and gross revenue in the range of 6%, and compound decreasing volume issues for taxicabs arising out of the recent addition of increased executive car service at the airport and decreased passenger volumes for the airport as the result of the global recession.

The taxi companies forecast that during "*the first year of operation by Avion ... (there would be) at least a 5.6% reduction in the taxicab revenue of the average taxicab ...*", and "*the initial effect of the Avion service would be to reduce the value of each Duffy's taxi by approximately \$16,000 or approximately a \$2,464,000 reduction in value for the whole Duffy's fleet ... for Unicity the corresponding numbers would be a reduction in the value of each taxicab of approximately \$14,000 ... reduction in value for the whole fleet of \$3,570,000 ...*".

Unicity advised that it currently “*allocates 50 or more vehicles on a daily basis to service the airport ... (and forecast that) ... in the first full year of the Avion shuttle service, it could be contemplated that at least 20 Unicity cabs would be redeployed to serve the general market in Winnipeg, rather than serving transportation to and from the airport and downtown hotels*”. Unicity claimed that the redeployment of taxicabs from the airport to the general Winnipeg market would lead to increased competition between taxicabs in Winnipeg, and as a result, reduce average annual revenue and net income for each cab (with longer hours for taxicab drivers).

In summary, Unicity/Duffy’s opposed Avion’s proposed shuttle service on several grounds, these including:

- a) “... *existing taxi and other transportation alternatives provide an adequate level of service to the public*”;
- b) “*the volume of traveling public ... between the airport and downtown hotels is currently well served by existing resources and consequently there is no need for the Avion shuttle*”;
- c) “*there is no demand or need for the Avion shuttle ... there are significant wait times for both taxicabs and limousines to obtain a trip from the airport ...*”;
- d) “... *if there was a significant demand for multiple passenger shared ride services, why would ... WAA have eliminated airport services by limousines*”; and
- e) “*increasing the supply of ground transportation ... would diminish the revenue of the existing taxi industry, lower the value of existing taxicabs and cause economic hardship to existing owners*”.

Hotels

Finally, the Board’s conditional decision on Avion’s application is of importance to the downtown hotels intended by Avion to be serviced by the shuttle service. Some of these

hotels may reduce or end their current “free” shuttle service to the airport for their patrons, reducing their expenditures and increasing their annual returns as a result.

Generally, the tourism industry, excluding the taxicab industry, supports the additional option of a shuttle service from and to the airport, asserting that such a service would be representative of an additional choice for travelers, a choice now available in most large cities.

Context

This Order should be read in conjunction with not only previous Board Order 137/09, but also orders 9/09 and 76/09, which, along with this Order, are available on request from PUB or accessible through PUB’s website, www.pub.gov.mb.ca.

2.0 Application to review and vary/Motion for leave to appeal (Order 137/09)

The following provisions of the operative section of Order 137/09 are the subject of an Application to the Public Utilities Board to review and vary, and a Motion for leave to appeal to the Court of Appeal, both by Avion Services Corporation (Avion), as well as an Application to the Board by the Winnipeg Airport Authority (WAA) for a variance:

"1. Avion Services Corporation may operate an airport/downtown hotel fixed-fee shuttle service, pursuant to Avion's agreement with the City of Winnipeg, subject to the following conditions:

- c) On or before April 1, 2010, the Winnipeg Airport Authority provide the Public Utilities Board a written undertaking that, upon final approval being provided by the Public Utilities Board, it will ensure Avion implements and operates the shuttle service for at least three years;*
- d) On or before April 1, 2010, the Winnipeg Airport Authority provide the Public Utilities Board its planned design and commitment to implement signage and other information particulars within and outside the airport terminal, satisfactory to the Public Utilities Board, setting out the various ground transportation means available to persons leaving the airport terminal, and the expected price or range of prices for such services;*
- e) On or before April 1, 2010, the Winnipeg Airport Authority provide the Public Utilities Board with assurance that the current ratio at terminal curb between taxicabs and executive cars (that being 4 cabs for each executive car) will not change without the approval of the Public Utilities Board;"*

Avion's grounds for its request that the Board review and vary and Avion's Court of Appeal motion are contained in the November 4, 2009 letter from its counsel, Paul Edwards (Duboff Edwards Haight & Schachter Law Corporation), as follows:

- "1. Avion has no ability to comply with the WAA conditions. They purport to impose requirements on the WAA as pre-conditions to the granting of Avion's Application. It is unreasonable, and indeed creates an impossibility, to require Avion to comply with conditions imposed on a different entity;*
- 2. Additionally and/or alternatively, the Board erred in purporting to impose the WAA conditions on WAA, which was not a party to the proceedings before the Board. Avion specifically advised the Board that it did not speak for or represent WAA in any aspect of the proceedings before the Board;*
- 3. Additionally, and/or alternatively, the Board erred in purporting to impose the WAA conditions in reliance upon findings and/or assumptions of fact which were erroneous and/or incomplete, and in doing so acted unreasonably; and*
- 4. Additionally and/or alternatively, the Board erred in purporting to impose the WAA conditions without any and/or proper evidence before it as to the reasonableness and/or ability of WAA to comply with those conditions."*

Avion asserts that it, therefore, has no ability to comply with Order 137/09 and commence operation of its proposed service and the prejudice or damage to Avion is therefore severe. The request is that the "WAA conditions" be removed.

For its part, WAA's position is stated in the November 4, 2009 letter from its counsel, Allan F. Foran (Aikins, MacAulay and Thorvaldson), and can be summarized as follows:

1. The Board, as a provincially constituted body, exceeded its jurisdiction in imposing the conditions that:

- (i) required WAA to cross-subsidize Avion's operations, to regulate WAA's management of signage on federal Crown land, and to require WAA to manage the ratio of executive cars to taxicabs at the terminal curb; and
 - (ii) essentially infringed on federal aeronautics jurisdiction.
2. The Board cannot do indirectly what it cannot do directly in regulating Avion's shuttle services by implementing conditions on WAA, when the Public Utilities Board has no authority over WAA's management of ground transportation at the airport.
3. WAA was not given notice that its own operations would be regulated by the Public Utilities Board and, also, was not given an opportunity to be heard at the hearing resulting in Order 137/09.

WAA seeks a variance of Order 137/09 by deleting the "WAA conditions".

3.0 Commentary, Avion and WAA Submissions

3.1 Avion

In addressing the argument advanced by Avion, the only assertions that warrant attention pertain to (a) Avion's inability to comply with WAA conditions, and, (b) the imposition of conditions on WAA (which was not a party to the proceedings before the Board).

The underlying principle relative to Avion's contention in (a) is the fact that, while Avion's Board of Directors is comprised of two senior executives of WAA and Avion is a subsidiary of WAA, the two are, by law, separate corporations (i.e. two separate legal entities). In other words, while Avion and WAA are clearly related companies, they are recognized as two separate legal "persons" under the law.

The non-arm's length and close relationship between Avion and WAA, based on the evidence at the hearing, supports the Board's position that the influence and control exercised by WAA over Avion, its subsidiary, has been and was clearly established. This substantiates the Board's imposition of the "WAA conditions" in Order 137/09, which conditionally approves Avion's application.

As for Avion's argument in (b) i.e. WAA being a non-party, while there may be some merit to that proposition at law, the facts referred to earlier, pertaining to the inter-relationship between Avion and WAA, plus the evidence of Avion's having consulted with WAA relative to the airport shuttle concept and WAA's obvious awareness of the subsequent events at the City (which entered into an agreement with Avion, subject to this Board's approval, also renders the "non-party" contention somewhat hollow.

Perhaps a court could be convinced that, in isolation, this aspect of Avion's complaint should be taken seriously. However, the Board is of the view that there may be sufficient evidence to support the Board's conclusion that the parent-subsidiary corporate relationship between WAA and Avion justified associating WAA with Avion's application seeking approval of the shuttle service.

In short, the Board is of the view that a Court could just as easily reject as accept, the "non-party" argument based on the evidence and the law. The Board remains of the view that Avion's operations are controlled and are controllable by WAA, and that in the absence of WAA's support, Avion would not have been and would not have brought forward an application for an airport-downtown hotel shuttle service.

3.2 WAA

As indicated, WAA's counsel raised a number of points calling into question this Board's jurisdiction and this Board's authority to "draw WAA into the fray". The assertion there

is that, as a provincial tribunal, the Public Utilities Board cannot impose conditions affecting WAA's federal aeronautics operations. This argument is not very convincing in that WAA's "aeronautics" business hardly includes a shuttle service. Having said that, there is one aspect of WAA's submission that does present a cause for concern from a legal standpoint.

A fundamental principle of administrative law is known as the "audi alteram partem" rule, which essentially states that a party to a proceeding is entitled to notice thereof and entitled to be heard (to defend its position).

While it is fair for this Board to assume, based on the evidence, that WAA had notice of the application and hearing, it is arguable that there was a deficiency or flaw in the process in that WAA, itself, was not formally provided an opportunity to state its position or defend its interests, separate and apart from Avion. This could constitute an infringement of WAA's fundamental right (to be heard) under the law, and it is possible that argument could convince the Court of Appeal to grant leave to appeal and, indeed, even rule in favour of WAA "at the end of the day" (resulting in the Board's "WAA conditions" being expunged from the Order).

If such a result were to occur, this Board may well take the position that the grounds on which it determined the shuttle service should operate would have been substantially changed, and vary its Order and reject Avion's application, an action that would most likely lead to more challenges, public confusion and additional costs, all of which this Board does not believe to be in the public interest.

3.3 Unicity/Duffy's Submission

The November 30, 2009 letter from Unicity/Duffy's counsel, Sid Soronow (Liffmann Soronow) sets forth the Interveners' position in the matter.

Essentially, their contention is that Section 47 of *the Public Utilities Board Act* (below) provides the Board with the authority required to issue an Order containing directions that meet the public interest, including the ability to provide conditional approval:

"47(1) The Board may direct, in any order, that the order or any portion or provision thereof shall come into force:

- a) at a future fixed time; or*
- b) upon the happening of any contingency, event, or condition specified in the order; or*
- c) upon the performance to the satisfaction of the board, of a person named in the order for the purpose, of any terms that the board may impose upon any party interested;*

and the board may direct that the whole or any portion of the order shall have force for a limited time, or until the happening of a specific event."

To that end, Unicity/Duffy's opposes the deletion of the three conditions being the subject of appeal. In referring to the two legal authorities cited by WAA's counsel relative to a provincial tribunal encroaching upon federal jurisdiction (aeronautics), Unicity/Duffy's contends that the cases are neither on point nor as definitive in their conclusions regarding the encroachment issue as WAA has proposed. Counsel for Unicity/Duffy's referred to the following excerpt from one of the cases:

"However, it is clear that the Federal jurisdiction is not just celestial; it is also terrestrial. It extends to those things in the air and on the ground that are essential for 'aerial navigation' or 'air transportation' to take place."

The assertion by Unicity/Duffy's' counsel is that there is nothing in Order 137/09 that is essential for either aerial navigation or air transportation to take place.

Further, the other case relied upon by WAA dealt with a situation where the Supreme Court of Canada decided an issue where airline companies objected to imposition of fees by the Ontario Liquor Board on liquor purchased overseas by the airlines. The Ontario government agency maintained that it was entitled to mark up liquor prices once the liquor was removed from the warehouse (at Pearson Airport) for use on domestic flights. The airlines took the position that they were not subject to provincial legislation.

The Supreme Court stated since Canada's airlines are federal undertakings they are not subject to provincial regulation of their affairs that are vital or integral to their operations. The Court held that the provision of liquor does not fall into that category, with the result that the airlines were found not to be exempt from the provincial law in question. Unicity/Duffy's contends that the same can be said for the operation of an airport shuttle service, so that the Public Utilities Board does have the jurisdictional scope to impose the "WAA conditions".

Regarding the argument by WAA that it did not receive notice and have the opportunity to make representations to the Public Utilities Board, the position of Unicity/Duffy's is that, with the close ties between the WAA and Avion (common directors, parent-subsidary relationship), Avion is basically the corporate alter ego of WAA. Accordingly, it argued that WAA did have notice of the proceedings and, indeed, could have participated if it so chose.

The Unicity/Duffy's submission concludes by emphasizing that the three "WAA conditions" are to protect the interests of the taxicab industry, which is essentially in the public interest. The assertion is that requirements to address the transportation options of the travelling public are therefore within the purview of Public Utilities Board's mandate and ought to be fulfilled.

Taken as a whole, the legal arguments raised by Unicity/Duffy's are legitimate, with the qualification hereinafter mentioned.

This Board accepts their assessment of the relevance and interpretation of the two cases relied upon by WAA. As well, the points raised by Unicity/Duffy's, regarding the close relationship of WAA and Avion, are borne out by the evidence.

However, the one area of Unicity/Duffy's submission that is troublesome pertains to the "right to be heard" argument brought forth by WAA. That, as previously mentioned, goes to the root of administrative law, the "audi alteram partem" principle.

It may well be that by reason of the undeniably close relationship of Avion and WAA, notice of the Public Utilities Board hearing procedure can be visited upon the WAA. By reason of the corporate law principle which deems two separately incorporated companies to be two separate "persons" at law, however, it is more difficult to state that with WAA's "perhaps" peripheral interest in the proceedings before the Board, WAA was given sufficient opportunity to state its position and defend its interests in face of the Board's decision to include in its conditional approval of Avion's application, conditions to be fulfilled by WAA.

Indeed, it is this latter concern that this Board will take into account in dealing with the appeal.

4.0 Options - Discussion

As pointed out by Unicity/Duffy's, the first option open to the Board is to deny the request to vary its Order. The Board anticipates that such a decision would likely result in Avion pursuing its application to the Court of Appeal, seeking leave to appeal Order 137/09.

The Court of Appeal could either grant leave or deny leave. In denying leave to appeal, it could either refuse to find merit in Avion's position or find that Order 137/09 is not a final order, by reason of its conditional nature and the Board's reference to "final" approval of the application to be considered later, once the numerous condition have been met.

Relative to this first option, regardless of the prospects for success, the Board is concerned that the furtherance of court proceedings in this matter may be contrary to the public interest, given the time, public confusion and attendant costs.

Alternatively, the Board could decide to vary its Order, and revise one or more of the "WAA conditions". Such a course of action, however, could still lead to the application for leave being pursued by Avion, if not a new application for leave to appeal brought by Unicity/Duffy's, and, again, the same concerns would apply relative to the public interest.

Also, alternatively, the Board could impose what it considers a "reasonable" compromise given the circumstances.

An approach that the parties considered "reasonable" may not only address the objections raised by Avion and WAA, but also appease Unicity/Duffy's, and, if that proved the case, furthermore remove the Board's concerns over the legal issue.

The latter, of course, relates to the fact that it is possible that a Court could find that the Board breached the "*audi alteram partem*" principle, by virtue of the fact that WAA was not afforded the opportunity to be heard in relation to conditions imposed upon it by the Board in Order 137/09.

While what represents “reasonable” is always subject to perception, the Board, seeking what is the public interest, determines that the public interest would best be met by a compromise.

The compromise established herein is expected to allow Avion to pursue the operation of its proposed shuttle service, subject of course to it successfully meeting the conditions set by the Board, while still protecting, to a reasonable degree, the interests of Unicity/Duffy’s and, above all, the public interest.

What is the public interest in this case? The Board finds that it is comprised of several aspects, which include continued adequate taxi service for the City at large, and to and from the airport in particular, all at a reasonable price, without, at the same time, so disadvantaging taxicab owners and drivers such as to either drive them out of the business in the medium to long-term, or require hours of work by taxicab drivers that are totally out of proportion to the expected returns.

The Board sought a balance between the interests of Avion, the taxicab companies and the general public. The revised conditions are anticipated to take into account the intent and spirit of Order 137/09 while, at the same time, addressing the objections of Avion and WAA.

5.0 Board Findings

Therefore, based on a thorough reconsideration of the directions of Order 137/09, and the evidence on the record that led to Order 137/09, and in the interests of reducing the risks of further delays and costs with respect to Avion’s proposed shuttle service, which the Board does not consider to be in the interests of any party, the Board will vary some of the conditions established in Order 137/09 and replace same, as follows:

1. Condition 1.c. of Order 137/09:

That, on the understanding that Avion will immediately file its latest financial statements with the Board, Avion will, on or before April 1, 2010, provide the Board with a written undertaking that, upon final approval being provided by the Board, it will operate the shuttle service for at least one (1) year and exercise its best efforts to continue to operate the service for at least a further two (2) years thereafter.

2. Condition 1.d. of Order 137/09:

On or before April 1, 2010, Avion will provide the Board with written confirmation of Avion's agreement with WAA regarding the planned design and commitment to implement signage and other information particulars within and outside the airport terminal, satisfactory to the Public Utilities Board, setting out the various ground transportation means available to persons leaving the airport terminal and the expected price or range of prices for such services and, further, Avion will cause a copy of the written Agreement to be entered into between Avion and the WAA to such effect to be filed with the Board before commencing the airport shuttle service.

3. Condition 1.e. of Order 137/09:

On or before April 1, 2010, Avion will provide the Board with written confirmation of Avion's agreement with WAA regarding assurance that the current ratio at terminal curb between taxicabs and executive cars (that being 4 cabs for each executive car) will not change without the approval of the Public Utilities Board and that if there is any intention to alter that ratio, WAA will provide Avion with reasonable notice thereof, with a view to obtaining the

approval of the Public Utilities Board relative thereto. Further, Avion will cause a copy of the written Agreement to be entered into between Avion and the WAA to such effect to be filed with the Board before commencing the airport shuttle service.

As indicated earlier, relative to the variance of condition 1.c. of Order 137/09, the basic premise is that if Avion lost money in the first year, and concluded it had no reasonable chance of operating profitably thereafter, it should be able to cease operations. If that situation develops, Avion would likely incur a significant cost – given the investment it would then have made in the service and the operating losses and commitments incurred.

On reconsideration, the Board concludes such a situation – the cessation of the shuttle one or more years after its commencement - would not affect the taxicab industry negatively; in fact, the Board surmises, from the evidence given at the hearing that led to Order 137/09, that the taxicab industry, and certainly Unicity/Duffy's, would welcome the cessation of the shuttle business.

Again, regarding condition 1.d. of Order 137/09, the variance essentially maintains the Board's requirement for signage not being preferential to either Avion or the taxicab industry in any manner, with WAA's commitment to the Board being substituted by the provision being incorporated in an agreement to be entered into between Avion and WAA instead.

As for condition 1.e. of Order 137/09, i.e. the ratio requirement - taxicabs to executive cars – it again remains intact. It remains the Board's understanding that, with the new airport terminal in service, the curb space for all ground transportation will be expanded, which will allow for the 4:1 ratio to remain in place. The Board further expects that the existing and proposed curb space plans will form part of the agreement to be entered into between Avion and WAA.

Costs and Appeals

In accordance with its Act, and as indicated in Order 137/09, PUB will assess costs resulting from Avion's application for the shuttle service in a separate order, which will follow.

And, as indicated in Order 137/09, as a significant portion of the costs to be assessed will be assigned to Avion, as a condition of approval to operate the Board will continue to require that any costs assessed Avion be paid before final approval of the service is effective.

Finally, the Board remains of the view that, in keeping with the spirit and intent of Order 137/09, TCB should hold a public hearing, well ahead of the possible commencement of Avion's shuttle service, towards considering revising Winnipeg taxi fares, and addressing the seemingly ever-increasing transfer value of an existing "medallion" taxi business licence.

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, www.pub.gov.mb.ca.

6.0 IT IS THEREFORE ORDERED THAT:

The directions of Board Order 137/09 are hereby and herein amended.

1. Avion Services Corporation (Avion) may operate an airport/downtown hotel fixed-fee shuttle service, pursuant to Avion's agreement with the City of Winnipeg (City), subject to the following conditions:

- a) On or before April 1, 2010, Avion will file both its last annual financial statements and an updated business plan meeting with the Public Utilities Board's approval, an approval to be secured prior to service commencing;
- b) Without restricting the generality of the requirement, Avion's updated business plan should be supported by financial projections for each of the first three years of service; a draft schedule indicating the "airport return" time duration; the number, make, model and cost of the shuttle vehicles to be purchased; Avion's contract with WAA and contracts with the downtown hotels to receive the service; a plan to accommodate disabled passengers; insurance coverage details; driver trainer program; etc.

(The Public Utilities Board suggests that Avion officials work with Board staff to best ensure the updated business plan will address all of the likely concerns of the Public Utilities Board.)

- c) On or before April 1, 2010, Avion provide the Public Utilities Board a written undertaking that Avion will, upon final approval being provided by the Public Utilities Board to operate an airport shuttle, operate the shuttle service for at least one year, and that Avion has the intention of operating the service for at least three years;
- d) On our before April 1, 2010, Avion enter into an agreement with the Winnipeg Airport Authority that will include provisions related to signage

and other information particulars to be made available within and outside the airport terminal, satisfactory to the Public Utilities Board, setting out the various ground transportation means available to persons leaving the airport terminal, and the expected price or range of prices for such services;

- e) On or before April 1, 2010, Avion will provide the Board with written confirmation of Avion's agreement with WAA regarding assurance that the current ratio at terminal curb between taxicabs and executive cars (that being 4 cabs for each executive car) will not change without the approval of the Public Utilities Board and that if there is any intention to alter that ratio, WAA will provide Avion with reasonable notice thereof, with a view to obtaining the approval of the Public Utilities Board relative thereto. Further, Avion will cause a copy of the written Agreement to be entered into between Avion and the WAA to such effect to be filed with the Board before commencing the airport shuttle service; and
 - f) On or before April 1, 2010, the costs levied by the Public Utilities Board against Avion be paid in full.
2. Once commenced, Avion may not materially vary its shuttle service (number and type of vehicles, schedule, destinations, pricing, etc.) without first obtaining the approval of the Public Utilities Board. (Materiality is to be determined by the Public Utilities Board, after a review of any proposed changes to the service.)
 3. Avion commence its service no earlier than April 1, 2010 and no later than July 1, 2010.

4. Following commencement of its shuttle service, Avion is to file with the Public Utilities Board its annual financial statements (which may be filed in confidence), no later than six months following the end of Avion's fiscal year, with the shuttle service's segmented results outlined therein.
5. On a triennial basis, pursuant to a process to be established by the Public Utilities Board, Avion will apply to the Public Utilities Board for approval of continuance, termination or revision of the shuttle service operation.

THE PUBLIC UTILITIES BOARD

"GRAHAM LANE, CA"
Chairman

"H. M. SINGH"
Acting Secretary

Certified a true copy of Order No. 169/09
issued by The Public Utilities Board

Acting Secretary