

MANITOBA

Order No. 76/09

THE PUBLIC UTILITIES BOARD ACT

May 6, 2009

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

**ORDER IN RESPECT OF UNICITY/DUFFY'S SECOND MOTION
CHALLENGING THE PUBLIC UTILITIES BOARD'S JURISDICTION
TO HEAR AVION SERVICES CORPORATION'S APPLICATION
AND TO HALT PROCEEDINGS**

Executive Summary

By this Order, the Public Utilities Board (Board or PUB) rejects the motion filed by Unicity Taxi Ltd. and Duffy's Taxi (1996) Ltd. (Unicity/Duffy or the taxi companies) to halt proceedings with respect to Avion Services Corporation's (Avion) application for an airport/downtown fixed-fee shuttle service. The proceeding will continue with a public hearing to commence on May 25, 2009.

The Board's decision to reject Unicity/Duffy's motion followed an oral hearing of the motion on April 29, 2009, and the receipt of information and positions from both Unicity/Duffy and Avion prior to the motion, on the question of the Board's jurisdiction.

Unicity/Duffy's motion was based on the premise that the Board lacked jurisdiction to hear Avion's application. Following a careful review of the evidence and deliberation following the April 29, 2009 hearing of the motion, the Board concludes that it has jurisdiction and that it is in the public interest for the scheduled hearing to proceed as planned.

Pre-Hearing Background:

The following review of the background for the hearing of Unicity/Duffy's motion is based on the pre-oral hearing filings of Avion and Unicity/Duffy and the Board's understanding of the motion brought before it and related matters:

1. Avion's seeking of PUB approval of Avion's application to operate an airport shuttle service first arose in January 2007, when the Council of the City of Winnipeg (City) passed a resolution referring the City's agreement with Avion to the PUB pursuant to Section 163(3) of The City of Winnipeg Charter (which agreement allowed Avion to operate a downtown/hotel shuttle service (service) in Winnipeg).
2. The Manitoba Taxicab Board (TCB) had earlier denied a similar application by Avion for the reason that a "public need" had not been established. When Avion thereafter applied to the City for approval of the service pursuant to Section 163(3) of The City of Winnipeg Charter, TCB approved that process and stated that the agreement and service did not fall within its jurisdiction.
3. The Board understands that the City's approval process involved five public meetings, at and during which Unicity/Duffy's did not call the City's jurisdiction into question.
4. While PUB's involvement in the airport/hotel shuttle service issue had surfaced in early 2007, Avion held its application to the Board in abeyance until certain preliminary matters (costs, public hearing process, etc.) were given further consideration.
5. On May 30, 2008, Avion apprised the Board of its intention to "recommence" proceedings and by letters of June 25, 2008 and October 21, 2008, Avion filed documentation with the Board in support of its application seeking Board approval of the agreement Avion had entered into with the City for operation of the service.

6. In accordance with the Board's *Rules of Practice and Procedure* (Rules), the Board required, and Avion published, a *Notice of Application* on November 5, 2008 in Winnipeg newspapers.
7. Following publication of that Notice, on November 17, 2008 Unicity/Duffy filed a preliminary objection and subsequently supplemented its position by way of additional correspondence dated December 10, 2008, opining that there is no "agreement" as such between the City and Avion, as required under subsection 163(3)(a) of The City of Winnipeg Charter. The taxi companies maintained that such an agreement was a "fundamental precondition" to PUB having jurisdiction over the matter.
8. The Board heard Unicity/Duffy's motion relative to the taxi companies' preliminary objection as part of the Pre-Hearing Conference for the Board's hearing of Avion's application, held on January 19, 2009. The Board's decision to deny the motion was included as part of its Order 9/09 issued on February 5, 2009.
9. In denying Unicity/Duffy's preliminary motion, the Board held that City's resolution of January 24, 2007 was indicative of an agreement between the City and Avion and of the City's request that PUB approve the agreement between the City and Avion prior to the coming into being of the service. The Board found that an agreement exists between the City and Avion and accordingly, the Board stated in Order 9/09 that it is assuming jurisdiction pursuant to Section 107 of *The Public Utilities Board Act* (which states, in part, that the Board may perform duties assigned to it by Acts of the Legislature, which includes The City of Winnipeg Charter).
10. The Board also concluded that the City's resolution of January 24, 2007 pertaining to Avion was based on Section 163(3) of The City of Winnipeg Charter, which states in part that where a person wishes to provide a local transportation service,

the City may enter into an agreement with that person but, before beginning to operate the service, approval of the agreement must be obtained from PUB.

Unicity/Duffy's Motion:

Unicity/Duffy's Position:

1. On March 18, 2009, Unicity/Duffy brought forward a new motion to halt Avion's proceedings before the Board on the basis that the City does not have "exclusive authority" over the proposed service intended by Avion, and that the City therefore did not have the authority to enter into an agreement with Avion. Accordingly, the taxi companies took the position that the Board does not have the jurisdiction conferred upon it by Section 163(3) of The City of Winnipeg Charter to deal with Avion's application.
2. Unicity/Duffy's position was based on the taxi companies' interpretation of The City of Winnipeg Charter, certain provisions of The Highway Traffic Act and The Taxicab Act and its Regulations.
3. The taxi companies submitted that in order for the Board to have jurisdiction, the local transportation service proposed by Avion would have to be within the City's exclusive authority to operate local fixed fare passenger transportation services, as those words appear in Section 163(1) of the City's legislation, and that the City does not have the requisite exclusive authority.
4. Unicity/Duffy argued that the City's authority does not extend to "taxicabs" which, they maintain, include the vehicles that Avion plans to employ in operating the service, and which, according to Unicity/Duffy require TCB licences.
5. In summary, Unicity/Duffy contended that TCB has jurisdiction over the service proposed by Avion and that, accordingly, the City does not have the "exclusive

authority" over transportation services that it requires to enable it to enter into an agreement with Avion, pursuant to Section 163(3) of the City's legislation, and to provide for PUB jurisdiction.

Avion's Position:

1. For its part, Avion maintained that the City has the requisite "exclusive authority" required with respect to the contemplated shuttle service, and thus had the jurisdiction required to enter into an agreement with Avion and for the City to refer the agreement to PUB.
2. Avion submitted as follows:
 - (a) a metered taxicab and a fixed fare transportation service are mutually exclusive, and TCB only regulates metered taxicabs; or, alternatively;
 - (b) Avion's proposed service is specifically exempted from the definition of "taxicab";
 - (c) the decision of TCB that it lacked jurisdiction is entitled to deference from PUB; and
 - (d) Unicity/Duffy's motion was spurious and/or vexatious.
3. Avion's contention as outlined in its pre-hearing brief, was essentially that (i) its proposed vehicles are not "taxicabs" within the meaning of the various legislation cited by Unicity/Duffy; (ii) the TCB declined jurisdiction in favour of the City because TCB's jurisdiction does not extend to a fixed fare shuttle service as planned for by Avion; (iii) the City clearly considered itself to have jurisdiction to enter into the agreement with Avion, by virtue of its referral to PUB; and (iv) Unicity/Duffy neither challenged TCB's decision that the service did not fall within its jurisdiction

nor the City's assumption of jurisdiction during any of cited numerous committee hearings before the City pertaining to Avion's proposed service.

Oral Hearing of Unicity/Duffy's Motion:

As provided for in the hearing schedule established out of the Pre-Hearing Conference, an oral hearing of Unicity/Duffy's motion took place on April 29, 2009 in PUB's offices. Parties participating were Unicity/Duffy and Avion, both parties represented by counsel.

Unicity/Duffy reiterated the information and positions set out in its pre-hearing filings with the Board, as did Avion.

Unicity/Duffy stressed its pre-hearing filing opinion that the City did not have the exclusive authority it required to enter into an agreement with Avion, and opined that as Avion's planned shuttle service would operate motor vehicles for compensation, those vehicles would be taxicabs and the service would be subject to the jurisdiction of the TCB, and accordingly, if Avion wanted to pursue its proposed service it should bring an application before TCB and the proceeding before PUB should be halted.

In support of its contention, Unicity/Duffy reviewed and interpreted certain provisions of The City of Winnipeg Charter, *The Highway Traffic Act*, and *The Taxicab Act* and its Regulations. As well, Unicity/Duffy denied that TCB had determined that it did not have jurisdiction with respect to Avion's proposed service.

The taxi companies argued that TCB could not relinquish the jurisdiction that it had over the matter. Unicity/Duffy's interpretations relied on the specific language of the various Acts and Regulations, and as well, on interpretations as to both Avion's intent and its plans with respect to vehicle types and planned services.

In opposition to Unicity/Duffy's motion, Avion, after confirming the Board's understanding of its position as stated in pre-hearing filings, argued that context and

“common sense” were required in assessing the merits of Unicity/Duffy’s motion. Avion submitted that both the City and TCB had rightly concluded that jurisdiction rested with the City and PUB, and that the service planned for by Avion was of a kind not intended or regulated by TCB. Avion also reiterated its view that TCB had reached a decision that it did not have jurisdiction and had formally communicated that decision by way of a November 22, 2008 letter from the Secretary of TCB to the City.

With respect to issues surrounding the specifics of Avion’s service, such as whether people with disabilities should be transported in vans equipped for that purpose or Avion should make its “best efforts” to have another service transport people with disabilities, and as to the maximum number of passengers Avion’s vehicles should transport, Avion suggested that the Board could place conditions on its approval of the service, if in the end, the Board did approve the service.

Avion argued that while vehicles such as those to be operated by Avion may not be specifically excluded in various Acts and Regulations as being subject to TCB regulation, a specific exclusion was not necessary and could be implied. Avion noted that City solicitors were involved in the City’s decision to enter into an agreement with Avion and to call on PUB to approve the arrangement, and that for PUB to grant Unicity/Duffy’s motion would not be in the public interest and would potentially leave open the claim that Avion would be unregulated, given deference to the perspectives of both the City and TCB as to jurisdiction.

Board Considerations:

1. As stated, the Board earlier held that City's resolution was indicative of an agreement between the City and Avion and the Board accepted the City's referral of the matter for approval or denial, so as to allow the Board to assume jurisdiction pursuant to Section 107 of *The Public Utilities Board Act*.
2. Now, the Board is being asked by Unicity/Duffy to find that the City did not have authority to enter into the agreement with Avion. One would have thought that this argument would have preceded the taxi companies' earlier jurisdictional argument that there was no such agreement (which earlier jurisdictional argument was denied by the Board and not appealed by Unicity/Duffy).
3. Be that as it may, the present motion essentially calls for the Board to interpret various enactments (other than its own) and to accept that present proceedings relative to Avion's application should be halted because the Board does not have jurisdiction in the matter.
4. Firstly, the Board has already ruled that it accepts jurisdiction by virtue of Section 107 of its own Act, in relation to the provisions of Section 163(3) of The City of Winnipeg Charter. That decision essentially recognized the agreement as being valid (and assumed by implication that the City considered itself to have the authority to make the agreement).
5. Secondly, the present motion calls for the Board not only to refute its earlier decision, but also to interpret legislative provisions in various enactments other than its own. Essentially, the Board is being asked to challenge interpretations by the TCB and the City of their own respective legislation.
6. Thirdly, there is the question of whether the public interest would be served by delaying these proceedings further. The matter first surfaced over two years ago,

and plans for a public hearing by PUB were held in abeyance for over a year before being resumed last summer. A Pre-Hearing Conference was held in January of this year, and, following that hearing, the Board ruled on an earlier preliminary objection (as to jurisdiction) by Unicity/Duffy. A timetable for proceedings was set at that time and the parties have responded to Information Requests issued by the Board. The public hearing relative to Avion's application is set for May 25, 2009.

7. The decision to be made by the Board is therefore whether it will continue to hold that it has jurisdiction and therefore proceed with the public hearing within the next month (in which case, of course, the present motion would be denied), or alternatively, whether it will allow Unicity/Duffy's motion and halt the proceedings and leave Avion, TCB, the City and the public all in a state of uncertainty.

Board Findings:

The Board concludes that Unicity/Duffy's motion to halt proceedings in Avion's application with respect to its planned airport/downtown shuttle service is without merit, and that it is in the public interest to continue the proceeding with the first day of the scheduled public hearing of Avion's application to be May 25, 2009.

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.

IT IS THEREFORE ORDERED THAT:

The motion by Unicity/Duffy seeking an Order halting proceedings regarding Avion's proposal to operate a fixed fare airport/downtown shuttle service BE AND IS HEREBY DENIED.

THE PUBLIC UTILITIES BOARD

"GRAHAM LANE, CA"

Chairman

"GERRY GAUDREAU, CMA"

Secretary

Certified a true copy of Order No. 76/09
issued by The Public Utilities Board

Secretary