

# Heenan Blaikie

## MEMORANDUM

RECIPIENT(S) John D. Stewart  
COPY Jay Duffield  
SENDERS George Karayannides  
Matthew Diskin  
DATE July 18, 2008  
SUBJECT•O/REF. **Application under Section 11 of the Public Vehicles Act (PickupPal *et al.*)  
Our File No.: 049704-0003**

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We have now had an opportunity to review the materials in connection with this matter, and for the reasons that follow, we seek your instructions to make a request that the application brought by Trentway-Wagar Inc. (“Trentway”) to the Ontario Highway Transport Board (the “Board”) be dismissed without a hearing because it does not have jurisdiction over PickupPal’s operation.

We understand that on June 26, 2008 the PickupPal program was changed to make it totally free for all users. Previously, PickupPal had charged drivers 7% of the funds they received for giving rides arranged through PickupPal. For various reasons, PickupPal made a change to its services on a worldwide basis that eliminates this fee. All the evidence filed by Trentway in support of its application dates to when PickupPal charged a fee. In our opinion, there is a good argument that by eliminating its fee, PickupPal took itself outside the jurisdiction of the Board.

Section 11 of the *Public Vehicles Act* (the “Act”) enables the Board to convene a hearing in two and only two situations. First, a hearing may be held relating to the operation of any transportation service conducted by means of a “public vehicle”. Second, a hearing may be held into the conduct of any person who operates or causes to be operated a “public vehicle”. Accordingly, section 11 of the Act only gives the Board jurisdiction to make an order under section 11 of the Act if a “public vehicle” is involved.

“Public vehicle” is a defined term in the Act, and a critical aspect of that definition is that the vehicle be operated for “compensation”. “Compensation” is also a defined term under the Act and includes any “rate, remuneration, reimbursement or reward of any kind paid, payable, or promised, or received, or demanded, directly or indirectly.”

In *Greyhound Canada Transportation Corp. v. Trentway-Wagar Inc.* (1997), 35 O.R. (3d) 145 (Gen. Div.) Justice Garton interpreted the definition of “compensation” as it appears in the definition of “public vehicle” in the Act. In this case the Greyhound bus company made a contempt application with respect to an order of the Board that Trentway cease transport of persons from Peterborough to Toronto. Trentway continued the service after the Board issued its order, but it stopped charging customers for it.

Despite the fact that the service was free, Greyhound took the position that Trentway was still receiving compensation for its services, in the form of goodwill.

After an extensive statutory interpretation analysis, Justice Garton concluded that the definition of “compensation” referred to something tangible and pecuniary. The argument that goodwill can constitute “compensation” under the Act was rejected, and Justice Garton determined unequivocally that the legislature did not intend to regulate a free transportation service with the Act.

The service offered by PickupPal is now 100% free. While drivers still receive some compensation from passengers in connection with rides arranged through PickupPal’s service, it receives nothing from either party. Therefore, under the *Greyhound* decision, there is a strong argument that PickupPal’s customers are not operating “public vehicles” on behalf of PickupPal because PickupPal receives no “compensation”.

The other side of the argument is that while PickupPal does not receive any money directly, it does receive those funds indirectly, in the form of advertisements. We would argue against this based on the *Greyhound* decision and the fact that the advertisements are viewed irrespective of whether a ride gets booked.

In addition, under the amended program, we would argue that the vehicles used by members fall into the definition of “carpool vehicles”, which are explicitly excluded from the definition of “public vehicles” under the Act. The Act defines a “carpool vehicle” as a motor vehicle that seats no more than 12 persons, with a maximum passenger payment frequency of not more than once a week, used for not more than one roundtrip per day and the operator of the vehicle does not own or lease more than one such vehicle. These conditions appear to be consistent with the situation of drivers using PickupPal. This is further support for our argument that the Board lacks jurisdiction to make an order prohibiting PickupPal from offering its services.

Our jurisdiction argument is bolstered by the fact that the Board has no remedial powers other than the ability to make an order prohibiting PickupPal from continuing its service in Ontario. The Board cannot order compensation to Trentway. We will argue that the elimination of PickupPal’s fee fully resolves the question of whether PickupPal is in contravention of the Act.

Procedurally, we can make a request in advance of the hearing that the application be dismissed without a hearing under subsection 4.6(1) of the *Statutory Powers Procedure Act* (the “SPPA”). We would suggest doing this by letter, copying counsel to Trentway and inviting their response, as is mandated by the SPPA. The Board could either choose to decide the matter at the time, or reserve the issue to the hearing in October.

In our opinion there is much to be gained by this tactic, with no downside risk. We would simply refer the Board to <http://www.pickupal.com> as evidence of the fact that the program is now free, and offer to provide affirmative affidavit evidence of that fact if requested.

We would be pleased to arrange a meeting or telephone call to discuss this at your convenience.