

City of Toronto's Comments on Proposed Greater Toronto Services Board - Protocol for Facilitating Dispute Resolution

(City Council on December 14, 15 and 16, 1999, amended this Clause by adding thereto the following:

“It is further recommended that City Council recommend to the Greater Toronto Services Board that the dispute resolution process be made available only if the party requesting the resolution process agrees to suspend any precipitous action as a condition of being able to utilize such process.”)

The Policy and Finance Committee recommends the adoption of the following report (November 24, 1999) from the Chief Administrative Officer:

Purpose:

This report outlines Toronto City Council's response to the draft protocol for facilitating dispute resolution between member municipalities of the Greater Toronto Services Board.

Financial Implications and Impact Statement:

The proposed protocol includes a provision that, in the event that external expertise (i.e. a professional mediator) is required, the GTSB will pay fifty percent of the cost and the disputing parties will share equally the remaining fifty percent. Participation in dispute resolution, as contemplated in the GTSB protocol, is voluntary. Therefore, it is difficult to envisage a situation where the City will incur costs without being a willing and deliberate participant in the process.

Recommendations:

It is recommended that:

- (1) this report be forwarded to the GTSB's Strategic Planning and Review Committee as Toronto City Council's response to the September 10, 1999 draft "GTSB Protocol for Facilitating Dispute Resolution", and circulated to all GTSB member municipalities for information; and
- (2) the appropriate City Officials be authorized and directed to take the necessary action to give effect thereto.

Background:

Subsection 23 (1) and clause 63 (2) (b) of the "Greater Toronto Services Board Act, 1998" enable the GTSB to facilitate the resolution of matters of intermunicipal concern within the GTA, if requested to do so by an affected municipality. The Act limits the GTSB's mandate in

dispute resolution to matters that fall within the two objects of the Board set out in Subsection 3 (1), that is:

- (1) to promote and facilitate coordinated decision making among the municipalities in the Greater Toronto Area; and
- (2) to exercise general direction and control over GT Transit and allocate the costs of GT Transit in accordance with this Act.

Section 23 of the Act identifies in general terms circumstances when the Board “may” or “shall” establish a committee of “as many members of the Board as it considers appropriate to hear the parties to the dispute and to assist the parties in resolving the dispute.” The Act does not provide further, more specific direction about how to trigger the GTSB’s involvement in dispute resolution or how a dispute resolution process would function. GTSB staff have prepared a draft “Protocol for Facilitating Dispute Resolution” to fill in the details. The document prepared by GTSB staff is included in Attachment # 1 at the end of this report.

On September 10, 1999 GTSB staff submitted the draft protocol for facilitating dispute resolution to the GTSB. The Board deferred consideration of the protocol and directed that it be circulated to all member municipalities for comment to the GTSB’s Strategic Planning and Review Committee by October 16th, 1999. While members of the Board were advised of the GTSB’s action in this regard in a communication dated September 29, 1999, the GTSB did not send the City Clerk a copy of the request for the City’s comments until November 4, 1999. The deadline for receipt of comments has since been extended to December 21, 1999. On November 10, 1999 the Policy and Finance Committee referred the GTSB’s draft protocol for facilitating dispute resolution to the Chief Administrative Officer with a request that he review it and report back to the Policy and Finance Committee. This report responds to that request.

The draft “GTSB Protocol for Facilitating Dispute Resolution” was circulated to all members of Council, the Department Heads and the Chief General Manager of the Toronto Transit Commission for their review. Any comments received have been taken into consideration in the preparation of this report.

Comments:

The draft protocol, as written, mixes up principles and administrative steps. The key principle identified by GTSB staff is the need for participation in dispute resolution to be voluntary. Other important principles are not included, but should be. For the dispute resolution process to have any credibility or usefulness, it must involve a neutral panel, be professionally mediated and, most importantly, be confidential.

Neutral Panel:

It is essential for the dispute resolution mechanism to require panels to exclude members from the municipalities that have an issue before them. Even if members from the disputing municipalities could be impartial in the proceedings, the perception of bias would be there and

would be difficult, if not impossible, to overcome, if a decision went in favour of their municipality. This would seriously undermine the integrity of the process. Preferably, the panel should play an administrative role only and not become involved in the details of the mediation.

Professional Mediation:

Facilitation of a resolution to the dispute should be led by a neutral third party, preferably a professional mediator. This would increase the level of trust in the integrity and value of the system, especially in the early life of the GTSB, and make municipalities more likely to utilize it. Without trust, the dispute resolution process will be useless.

Confidentiality:

The draft protocol mirrors a voluntary Alternative Dispute Resolution (ADR) procedure, which is being used increasingly as an alternative to litigation in the courts. In voluntary mediation, the parties are often required to sign agreements to ensure confidentiality the requirement for confidentiality, both for panel members and the disputing municipalities, should be formalised in the protocol.

The implication of confidentiality is to allow the disputing parties to speak more openly and make admissions or concessions that they may not be able to do in a public forum. Confidentiality provides an opportunity to reach a negotiated settlement to a dispute, rather than taking more extreme measures, such as court action. Without some sort of agreement respecting confidentiality, the parties will tend to be very cautious of what is said for fear that it can be used against them at a later date. Even if the parties were to agree that statements made were without prejudice, as the draft protocol proposes in point No. 9, simply having media access to comments that do not back the “party line” can be harmful. Confidentiality allows for a franker, fuller discussion, increasing the chances of reaching an agreement.

Under the “*GTSB Act, 1998*”, panels established as part of the dispute resolution process, are committees of the GTSB. As such, they are subject to the open meeting requirements of *Section 55 of the “Municipal Act”*. These provisions could be used to allow in camera meetings relating to litigation or potential litigation, receiving solicitor-client advice, security of property, or potentially under the “*Municipal Freedom of Information and Protection of Privacy Act*”. Each matter would have to be assessed on its own merits. The possibility that panel meetings and reports to the Board would be public reinforces the need to limit these panels to an administrative role and not involve them in the details of the mediation at all.

The Scope of the the GTSB’s Dispute Resolution Role:

What is the point of the GTSB becoming involved in the resolution of a dispute given that municipalities have recourse to various forms of mediation now? It is important to define the scope of matters that would properly be referred to a GTSB facilitated process. The legislation refers to matters within the objects of the Board. Point # 2 in the draft protocol states that the GTSB determines whether a matter falls within its mandate. Given the vagueness of the GTSB’s mandate and its lack of specific powers, this statement is problematic. It is too general to say

that, if a matter falls within its mandate, the GTSB would be involved in looking at the issue, if asked by a member municipality. Many issues arise now and municipalities talk to each other and resolve them. The GTSB dispute resolution protocol should not become a vehicle for a municipality, which does not want to address an issue, to drag out the time. It should also not duplicate the capacity of municipalities to engage in mediation efforts at their own initiative. The GTSB role in facilitating dispute resolution should be limited to major policy or financing issues that have a broad impact on the region. This is especially important in the early life of the GTSB to avoid becoming mired in more process.

Conclusions:

This report reviews the draft “GTSB Protocol for Facilitating Dispute Resolution” which the GTSB circulated to member municipalities for feedback. The protocol, as written, mixes principles and procedural steps, which makes it a longer and denser document than is necessary. The key comments in response to the document are that the process must involve a neutral panel, be professionally mediated and, above all, be confidential. The scope of matters falling within the purview of the process should also be narrowed down to major policy or financing issues that impact the region and should be defined more clearly.

It is recommended that this report be forwarded to the GTSB’s Strategic Planning and Review Committee as Toronto City Council’s response to the September 10, 1999 draft “GTSB Protocol for Facilitating Dispute Resolution”, and circulated to all GTSB member municipalities for information.

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Attachment No.1

GTSB Protocol for Facilitating Dispute Resolution (as submitted to the GTSB by the Executive Director on September 10, 1999):

- (1) A member municipality may request the Board to assist in the resolution of conflicts;
- (2) The GTSB determines whether it is a matter that falls within its mandate or not;
- (3) For all of those matters that fall within its mandate the GTSB establishes a panel of member(s) of the Board in order to facilitate a resolution of the dispute (the “Panel”);
- (4) For all of those matters that fall outside of the mandate of the GTSB the GTSB will review the request to determine if the dispute is one in which the GTSB can usefully or properly contribute to the resolution of the dispute through its facilitation services.

If the GTSB finds that it would be useful and proper to facilitate a resolution to the dispute then it will establish a panel of member(s) of the Board in order to facilitate a resolution of the dispute;

- (5) The Panel will comprise Chairman Tonks and the Chairman of the relevant Board committee (eg. in the case of a transit integration matter this would be the co-chairs of the Transportation Committee), as well as such other Board members as are required to ensure knowledge and understanding of the matter in dispute and to reflect a GTA-wide perspective, while recognizing that a panel of no more than three to five members is preferable;
- (6) The Panel may engage a professional facilitator(s)/mediator(s) or such other external expertise as may be deemed appropriate to assist it in facilitating the resolution of the dispute. (Should external expertise be required the GTSB will pay 50 percent of the cost and the disputing parties will equally share the remaining 50 percent);
- (7) The Panel shall begin by identifying the parties to the dispute and establishing their willingness to participate in the facilitation process;
- (8) All participation in the facilitation process is voluntary, parties may discontinue their involvement in the process at any time without consequence;
- (9) All parties to the facilitation process must agree, as a condition of participating, that they are participating in the process on a “without prejudice” basis and that statements made during the process can not be used in a subsequent actions;
- (10) Once the parties have been identified the Panel will through discussions with the parties establish the issues that will be part of the facilitation process and get agreement among the parties for this issues list. Documents will be submitted outlining the facts of the issue and the positions that the respective organizations are taking;
- (11) The Panel will, if necessary, propose and establish agreement on the process for the facilitation, ie. the terms and conditions;
- (12) The Panel will then make a preliminary report to the Board on the parties, issues, process and time frame for the facilitation;
- (13) The Panel will, from time to time, report to the Board on progress with the facilitation;
- (14) In the event that a complete resolution of the dispute is not achieved, the Panel may attempt to get the parties to agree on a partial settlement or a narrowing of the issues that might be involved in subsequent actions around the dispute;
- (15) Any agreement reached between the parties will be acknowledged in a “Minutes of Settlement” to be signed by the parties at the conclusion of the facilitation process;

- (16) The Panel will make a final report to the Board on the facilitation including any agreement reached; and
- (17) In the event that the facilitation process is not concluded by the prescribed time, the Panel must seek and secure an extension from the Board – otherwise the facilitation will be discontinued.

The Policy and Finance Committee also submits the following communication (November 5, 1999) from the Regional Clerk, Regional Municipality of Durham addressed to the Executive Director, Greater Toronto Services Board:

Ms. Morrow, the Committee of the Whole of Regional Council considered the above matter and at a meeting held on November 3, 1999, the Council of the Regional Municipality of Durham adopted the following recommendations of the Committee, as amended:

- “(a) THAT, if the Greater Toronto Services Board adopts a protocol to facilitate inter-municipal disputes, the process be based on the following principles:
- (i) voluntary participation;
 - (ii) informal and cooperative approach;
 - (iii) neutral panel;
 - (iv) professional mediation;
 - (v) confidential;
 - (vi) no duplication with other dispute resolution processes;
 - (vii) time limited;
 - (viii) generic process; and
 - (ix) cost shared by the disputing parties.
- (b) THAT the Board only respond to dispute resolution requests that are within its mandate;
- (c) THAT Joint Report No. 1999-J-29 of the Chief Administrative Officer, Commissioners of Finance, Planning, Economic Development and Tourism, Works and Medical Officer of Health be endorsed as the Region of Durham’s comments on the proposed dispute resolution protocol;
- (d) THAT Appendix B to Joint Report No. 1999-J-29 of the Chief Administrative Officer, Commissioners of Finance, Planning, Economic Development and Tourism, Works and Medical Officer of Health, (Seamless Transit Vision) of the proposed dispute resolution

protocol be circulated to GTSB member municipalities for review and comment before it is considered by the Board; and

- (e) THAT Joint Report No. 1999-J-29 of the Chief Administrative Officer, Commissioners of Finance, Planning, Economic Development and Tourism, Works and Medical Officer of Health be forwarded to other Regional Municipalities in the GTA, the City of Toronto, and the area municipalities in Durham for their information.”

Enclosed, as directed, is a copy of Joint Report No. 1999-J-29.

(A copy of the Joint Report No. 1999-J-29, referred to in the foregoing communication was forwarded to all Members of Council with the December 7, 1999, agenda of the Policy and Finance Committee and a copy thereof is also on file in the office of the City Clerk.)