



STAFF REPORT ACTION REQUIRED

Declaring the Toronto Transit Commission an Essential Service in Toronto

Date:	September 22, 2008
To:	Executive Committee
From:	City Manager
Wards:	All
Reference Number:	

SUMMARY

The purpose of this report is to provide the Executive Committee and City Council with information regarding the options for and consequences of recommending to the Government of Ontario that they designate transit in Toronto as an essential service.

The report:

- outlines different collective bargaining dispute resolution methods used in Union-Management negotiations in North America,
- provides information on the current federal legislation (Canada) and provincial legislations in Canada regarding collective bargaining and essential services,
- provides a brief review of the comparative cost of freely negotiating collective agreements versus arbitration, and
- outlines the impact, if known, on the City of Toronto of a strike at the Toronto Transit Commission, including economic, health, traffic and environmental impacts.

RECOMMENDATIONS

The City Manager recommends that:

1. City Council receive this report for information.

Financial Impact

There are no immediate financial implications in relation to this report.

ISSUE BACKGROUND

On April 1, 2008, the Amalgamated Transit Union (ATU), Local 113 was in a legal strike position with the Toronto Transit Commission (TTC). The negotiation teams reached a tentative new agreement on April 20, 2008, which subsequently was voted on by the union members with the final results known on April 25, 2008. A majority of voting union members rejected the new collective agreement. Following the failure of the Local 113 membership to ratify a new tentative collective bargaining agreement negotiated between the parties, at 12:01am, Saturday, April 26, 2008, the members of ATU Local 113 commenced an unannounced strike action. On Sunday, April 27, 2008, a back-to-work law (Bill 66) was unanimously passed by the Ontario Legislature and transit staff returned to work later that day. Outstanding bargaining issues were referred to an arbitrator to resolve.

Subsequently, the Executive Committee asked the City Manager to provide a report discussing the options and consequences of the City formally requesting that the Province of Ontario designate the TTC as an essential service.

COMMENTS

Generally, the collective bargaining environment in the broader public sector in Ontario, as it is in the rest of Canada is premised on the right to freely negotiate Collective Bargaining Agreements between employers and their employees' representatives (Unions and Associations). This right was ingrained initially in Canada after the advent of the Wagner Act (National Labor Relations Act) in the USA in 1935. The Canadian provinces created similar legislation (1937 onward) in Canada (e.g., 1937, the *Freedom of Trade Union Association Act* of Alberta) that paralleled most of the provisions within the Wagner Act. Generally, free collective bargaining (unfettered strike/lockout model) continues to be ingrained within provincial public policy and has remained in existence through numerous changes in political parties and successive governments.

That being said, extensive changes (i.e., introduction of a no strike model) were made in Ontario over the years to address the needs of specific employer-employee group relationships such as the Police and Fire Services. In addition, changes that place limits on an employee group's ability to strike have been made for other sectors including the Health Sector (including Essential Ambulance Services) and public servants in the Ontario Public Service. These latter employee groups can take part in a strike but are required to negotiate an agreed minimum level of continuity of staffing during a strike (i.e., a limited strike model).

The TTC functions under the unfettered strike model. However, the impact of this model is mitigated from time-to-time by the application of special provincial legislation (i.e., back-to-work legislation). Considerations of essentiality of the service, inconvenience to the public, and economic loss ensure that stoppages will usually be ended quickly by provincial legislation. This was demonstrated in the recent TTC Local 113 strike that led to return-to-work legislation within one day of the commencement of the strike.

There are four common models of dispute resolution that are used in North America. They are:

1. Unfettered Strike Model
2. Limited Strike (Designation) Model
3. Essential Service Model
4. Miscellaneous Other Models

A. Strike/Arbitration Models

1. Unfettered Strike Model

Under this model the parties' right to strike or lockout is defined within the collective agreement that binds the parties and the applicable labour legislation. Generally, collective agreements restrict employees' right to strike or the employer's right to lockout during the term of the collective agreement. The parties can strike or lockout as soon as they are in a legal position to do so, generally after the expiry of the collective agreement. Research has indicated there is a 93% average settlement rate in Canadian Public Sector collective bargaining, and a 95% average settlement rate overall. If the parties are unable to come to agreement, they have the option to strike/lockout or to agree to refer outstanding issues to an arbitration process for final resolution.

2. Limited Strike (Designation) Model

This model is a hybrid of the unfettered strike and the essential service models.

Under the limited strike model the parties are bound to an agreement that defines the number and classification of staff that can participate in strike activities. Agreements are either entered into voluntarily or, failing agreement, imposed by a third party. This model attempts to balance each party's right to bargain freely, while protecting services that are deemed essential to the public. A primary factor in determining whether the service provided is essential is the effect on the health and safety of the public if the service is withdrawn, versus the group's right to freely withdraw its service. The parties have the right to refer the outstanding issues to an arbitration process for final resolution. In Ontario, the Ontario Public Service have been covered by this model since 1993, when the NDP government changed the Crown Employees Collective Bargaining Act (CECBA) which had previously wholly prohibited strikes by public servants.

However, the *Ambulance Services Collective Bargaining Act*, 2001, S.O. 2001, c.10, as amended (the *Act*) provides for the operation of an essential ambulance services agreement ("EASA") during the period of collective bargaining. At the City of Toronto, this *Act* applies, in part, to the TCEU Local 416 and CUPE Local 79 collective agreements. When a collective agreement covering ambulance workers is being negotiated, the statute requires that the parties must have an EASA before ambulance workers in the bargaining unit can engage in a strike. The City of Toronto has had EASAs with both Unions.

Montreal Model

In Montreal, Quebec, the Societe de Transport de Montreal (STM) or “Metro” as it is commonly referred to provides transit services to the citizens of Montreal. Their service includes Subway, Bus and Paratransit service (similar to the TTC’s Wheel-Trans service).

Public transit is not considered an essential service in Quebec. Quebec has a statutory scheme to deal with the protection of the public interest through the maintenance of essential services, while it bans the use of replacement workers, the Essential Services Council administers legislative provisions by monitoring, mediating and adjudicating questions of whether a strike affecting a public service could endanger public health and safety. The statute does not recognize economic impact as a criterion for the designation of essential services.

On May 22, 2007, the MTC experienced its 15th transit strike in the preceding 40 years. Prior to the commencement of the strike, hearings were held before the province's Essential Services Council, to establish a minimum level of services for the public in the event of a labour walkout. The Union for the MTC agreed to abide by the minimum level of services outlined by the Essential Services Council on May 17th. The schedule limited service to peak periods including:

- Buses and the Metro would offer full services during limited hours on weekdays: from 6 a.m. to 9 a.m., 3:30 p.m. to 6:30 p.m. and 11 p.m. to 1 a.m.
- Services on the weekends would operate from 6 a.m. to 9 a.m., 2 p.m. to 5 p.m. and 11 p.m. to 1 a.m.
- The transit service for the disabled would run as usual, as it is deemed essential.

3. Essential Service Model

This model is most common in the Police and Fire Services sectors and provides that all outstanding issues following the collective bargaining process are referred to mandatory interest arbitration for determination by a third party. The designation that a service is essential is found under statute and is based on a strict life, personal safety, or health definition of essentiality. This determination falls under the jurisdiction of the Province of Ontario. The key factors considered in making this decision relate to health and safety issues. See attachment 1 for supplementary information.

In order to determine that an employment sector is “essential”, factors that are considered include: the past labour disputes; the public interest; the effects of a work stoppage on public safety; cost of settlement on the public; and public pressure to settle the matter.

In Ontario, when the collective bargaining process between the parties fails to achieve a new agreement, the outstanding matters are referred to an Interest Arbitrator who hears both sides and then renders a final and binding decision (i.e., no ratification vote). Under this type of interest arbitration, the general view is that the final decision tends to be a compromise that falls somewhere between what the Union is demanding and what the employer is offering.

Under the Ontario provincial act for the firefighters' sector, the *Fire Protection and Prevention Act, 1997*, Section 50.5 (2) states:

In making a decision, the board of arbitration shall take into consideration all factors the board considers relevant, including the following criteria:

- 1. The employer's ability to pay in light of its fiscal situation.*
- 2. The extent to which services may have to be reduced, in light of the decision, if current funding and taxation levels are not increased.*
- 3. The economic situation in Ontario and in the municipality.*
- 4. A comparison, as between the firefighters and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.*
- 5. The employer's ability to attract and retain qualified firefighters.*

It is not uncommon for an interest arbitrator to pick bits and pieces of each party's submission to fashion the collective agreement with the aim being to replicate what the parties would have arrived at through free collective bargaining. In addition, experience in Ontario has shown that arbitrators attach little weight to the issue of an employer's ability to pay as it is assumed that firefighters' employers always have the ability to find the necessary funding by increasing their revenues through taxes.

4. Other Models

Another model that exists but is less commonly used is the binding-nonbinding arbitration option. This model provides that all outstanding issues that are not determined during the Collective Bargaining process are referred to a mediation-arbitration (Med/Arb) process similar to that which is used under the Essential Service Model; however, under this model, the decision of the arbitrator is binding unless either side rejects it by a supermajority vote.

Both parties are involved in the design of the binding-nonbinding process. Issues that they determine include the level required for a supermajority vote to reject the award, the method of choosing arbitrators and the size and compensation of the arbitration panel, and the type of arbitration (Conventional Interest Arbitration vs. Final Offer Arbitration).

A variation of this model exists under the Los Angeles Public Transportation Labour Disputes Act, which provides that either party to a dispute can request gubernatorial intervention. Under this model the Governor of the State has the power to determine if a strike or lockout would “significantly disrupt public transportation services and endanger the public’s health, safety, or welfare.” The Governor under the legislation may appoint a fact-finding board to prepare a report within seven days, which may lead to the Governor obtaining a sixty day injunction barring a strike or lockout. Following the injunction period, the parties are either referred to the binding-nonbinding arbitration system if they reach agreement on the terms or they follow the Unfettered Strike Model.

B. Evaluation of the Models

The different models and systems of dispute resolution have been researched to identify and evaluate their effectiveness in different situations. The results of this research is included in Attachment 3 and organized under the following categories:

1. Effects of Compulsory Arbitration on Collective Bargaining
2. Experience of Mandatory Arbitration
3. Other Arbitration Approaches

In evaluating the different models and systems, the research has considered the following criteria: the extent to which work stoppages are avoided; the degree to which outside intervention in bargaining is minimized; the extent to which outcomes are balanced and do not unduly favour one party over an extenuating period of time; the costs of a strike vs. arbitration; and the acceptability of the system to the parties.

All of the above factors should be considered in deciding which model will work optimally for the Toronto Transit Commission and the City of Toronto.

C. Toronto Transit Commission Review

At its August 27, 2008, TTC Commissioners meeting, the TTC received the Staff Report that recommended that the "status quo" continue in regards to the collective bargaining model used i.e., continuation of the unfettered strike model. See attachment 2.

D. Cost of Collective Bargaining versus Compulsory Interest Arbitration

There has been much debate regarding whether the collective bargaining outcomes become more costly with compulsory interest arbitration versus collective bargaining.

Please see attachment 3 in regards to information and research on the challenges and costs of arbitration versus negotiated collective agreements.

E. Economic, Emergency Services and Public Safety Impacts Caused By Strike Action at TTC

According to the City's Economic Development, Culture & Tourism (EDCT) Division, the main impact of a TTC strike would be a reduction in the total output of goods and services produced in the City, resulting from increased travel times and commuters making alternative work arrangements.

Peak period commuters from the rest of Toronto to the Central Area are likely to suffer the greatest impact. Some people will work at home or will make arrangements to travel off peak. However, non-TTC commuters will also be affected, because increased congestion on the roads will increase travel times for all commuters. EDCT have estimated the short-term effects on the City of Toronto's economy caused by a strike at the TTC are approximately \$50 million per day (Monday to Friday). This estimate is based on the assumption that a TTC strike would reduce the total output of goods and services produced in the City of Toronto (over \$500 million per day) by about almost 10%. In addition, there would be some long-term negative impacts on the City's image as a business location and a tourism destination.

The Toronto Fire Services, Toronto Emergency Medical Services and the Toronto Police Services have each provided their assessment regarding the impact of a strike at the TTC on their ability to effectively respond to emergencies. Each service has reported that there has been no noticeable effect upon their response times or ability to respond due to a strike by TTC employees and the interruption of TTC services.

According to Toronto Public Health, although there is no available data quantifying any health impacts during a transit strike in Toronto, it is reasonable to predict there will be a number of potential public health risks inherent in a TTC strike, including: increased air pollution from higher levels of car use; and barriers to access health services. These risks are likely to be felt more significantly by the most vulnerable segments of the City's population. As the City (as a matter of policy) moves to shift transportation increasingly toward public transit, these risks will only increase.

F. Impacts of Congestion and Transportation Services Caused By Strike Action at TTC

According to the City's Transportation Services Division, the impact of a strike on traffic congestion will be dependent on several factors, including the lead time transit users have to prepare for a strike and the duration of the strike.

In the event of a short strike of a couple of days, the rush hours tend to be longer and have slightly more congestion. In these situations, commuters quickly make alternate arrangements include working from home, car-pooling, riding a bicycle, or walking to their destinations.

In the event of a strike that is of longer duration (i.e., 3 weeks or more) residents continue to make alternative work arrangements, as identified above. Residents, especially in the downtown area, will generally avoid driving during rush hours, if at all possible, and many residents will continue to walk to their destinations.

During a TTC labour disruption, the City would enact additional parking/stopping restrictions on selected arterial roads to allow for more efficient movement of vehicles. An issue that does arise is illegal parking of vehicles on side streets. Many transit users would use their vehicles to drive to work but would be unable to get a legal parking spot. This will result in drivers parking their vehicles in no parking areas which in some cases could block traffic and create safety concerns.

The key to minimizing the impact is adequate notification of a possible labour stoppage in order for the City (i.e., Transportation Services) to enact the above measures and to communicate the information to the general public.

CONCLUSION

The above information and research identifies a number of issues and concerns with designating transit as an essential service including: the potential for higher labour costs; reduced ability for the parties to reach negotiated settlement; and it does not completely eliminate the possibility of future labour disruptions.

This report has outlined the options for and the consequences of City Council formally requesting the Government of Ontario to designate transit in Toronto as an essential service.

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ATTACHMENTS

1. Essential Services Legislation Summary
2. TTC Staff Briefing Note provided to the TTC Commission
3. Research on Essential Service Settlements and Compulsory Arbitration

Attachment 1

Essential Services Legislation

The following is a brief summary of essential services legislation in Canada, Quebec, British Columbia and Ontario plus employees covered by state legislation in the USA.

Federal (Canada) Jurisdiction

- The employer determines the level of service required. The parties can negotiate the number of employees required to provide the essential services at the level determined by the employer.¹
- Either the employer or the bargaining agent can apply to the Public Service Labour Relations Board (“PSLRB”) if they are unable to agree on the terms of an essential services agreement.²
- The PSLRB can make the determination on the disputed terms of an essential services agreement, but it cannot change the employer’s determination as to the level at which an essential service is to be provided.³
- Once in place, an essential service agreement continues until the workplace parties jointly agree that the employer is no longer required to provide essential services.⁴

Quebec

- The employer and the union negotiate what essential services must be maintained in the event of a strike. If no agreement is reached, the union forwards to the employer and to the Conseil des Services Essentiels (the “Conseil”),⁵ a provincial Tribunal, a list setting out the essential services to be maintained in the event of a strike.⁶
- On receiving the agreement or list, the Conseil assesses whether or not the essential services provided are sufficient. If the Conseil considers the services to be insufficient, it recommends to the parties amendments to the agreement or the list. The Conseil may also order the union to postpone the exercise of its right to strike until it informs the Conseil of the action it intends to take in respect of the recommendations.⁷
- The Conseil reports its recommended changes, if any, to the list or agreement to the Minister responsible for the *Labour Code*’s administration who, in turn, makes a recommendation to the provincial Government.
- The provincial Government may, by order, require an employer and a union in that public service to maintain essential services in the event of a strike.

¹ Treasury Board website “Guidelines for Essential Services Agreements”, Section 4.2 http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TBM_11B/esa-ese01_e.asp#_Toc90359815

² Treasury Board website “Guidelines for Essential Services Agreements”, Section 5.1.5 http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TBM_11B/esa-ese02_e.asp#_Toc90359820

³ Treasury Board website “Guidelines for Essential Services Agreements”, Section 5.1.5 http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TBM_11B/esa-ese02_e.asp#_Toc90359820

⁴ Section 125 of the *PSLRA*

⁵ Established by s. 111.0.1 of the *Labour Code*

⁶ Section 111.0.18 of the *Labour Code*

⁷ Section 111.0.19 of the *Labour Code*

British Columbia

- The Labour Relations Code requires employers and unions to maintain certain essential services to the public when they take job action in a labour dispute. *Essential services are those related to the health, safety or the welfare of British Columbia residents, or to the provision of primary or secondary educational programs.*
- One of the issues that needs to be considered is the necessary staffing levels required for various services. The employer and union involved generally work together with the assistance of a mediator to determine what services should be designated as essential and the staffing levels required. If agreement cannot be reached, the Board determines the essential services and staffing levels.⁸
- Where a dispute arises after collective bargaining has commenced, the Chair of the BC Labour Relations Board (the “Board”) may investigate whether or not the dispute poses a threat to the health, safety or welfare of the residents of British Columbia, or the provision of educational programs to students and eligible children under the School Act, and report the results of the investigation to the Minister responsible for the administration of the Code.⁹
- Alternatively, the Minister can act on his/her own initiative
- If the Minister considers that the dispute poses a threat to the health, safety or welfare of the residents of British Columbia, he/she may direct the Board to designate as essential services those facilities, productions and services that it considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia.¹⁰
- If the Board is directed, by the Minister, to designate the services as essential, the workplace parties cannot strike or lock out until the Board has made the designation. Any subsequent strike or lockout must comply with the Board’s designation.¹¹
- Essential service disputes are treated like other disputes, apart from those measures required to ensure that services which prevent immediate and serious danger to the health, safety or welfare of the public, or immediate and serious disruption to primary or secondary educational programs, are maintained. These unions and employers are subject to the same rules for strike votes, picketing and replacement workers as are other unions and employers. However, they do have an additional requirement for providing strike notice. The union or employer must provide a new 72-hour notice if one notice period ends without any strike or lockout occurring.¹²

⁸ Labour Relations Board British Columbia – information web pages

⁹ Section 72(1) of the *Labour Relations Code*

¹⁰ Section 72(2) of the *Labour Relations Code*

¹¹ Sections 72(5) to 72(8) of the *Labour Relations Code*

¹² Labour Relations Board British Columbia – information web pages

Ontario

- In the case of Hospital employees¹³, firefighters¹⁴ and police officers,¹⁵ the parties are directed to arbitration as a means through which matters in dispute may be resolved. For such employees, the provisions of the *Labour Relations Act*¹⁶ simply do not apply. They do not have the right to strike.
- In the case of Crown employees,¹⁷ emergency medical attendants or paramedics,¹⁸ employers and bargaining agents are required to negotiate and maintain an essential services agreement
- In the event that employers and unions in such workplaces are unable to resolve the terms of an essential services agreement, either the employer or the union can apply to the Ontario Labour Relations Board for assistance¹⁹
- Once such an essential service agreement is in place, such parties can either lock out or strike, subject to the terms of the essential services agreement²⁰

U.S.A. Labour Relations Framework²¹

- In New York State as in many others, the *Civil Service Law* prohibits any public employee or employee organization from engaging in a strike, and any public employee or employee organization from causing, instigating, encouraging or condoning a strike.²²
- Employees of the New York City Transit Authority are subject to this prohibition.
- In the event of an impasse in collective bargaining disputes, the issues are resolved by an Arbitration Board comprised of representative members appointed by the workplace parties and a chair appointed by the workplace parties in concert.²³
- The arbitration board is empowered to hold hearings on all matters within the scope of negotiations related to the dispute for which it was appointed.

¹³ Section 4 of the *Hospital Labour Disputes Arbitration Act*

¹⁴ Section 50 of the *Fire Protection and Prevention Act*

¹⁵ Section 122 of the *Police Services Act*

¹⁶ Sections 3(d) and 3(e) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, Sched. A, as amended

¹⁷ Section 31(1) of the *Crown Employees Collective Bargaining Act*

¹⁸ Section 3 of the *Ambulance Services Collective Bargaining Act*

¹⁹ Section 36 of the *CECBA* or section 9 of the *ASCBA*

²⁰ Section 13 of the *CECBA* or section 12 of the *ASCBA*

²¹ Matters of collective bargaining fall within the jurisdiction of state government. In the majority of U.S.A. states, public sector employees do not have the right to strike. Exceptions to this general rule include Alaska, Hawaii, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont and Wisconsin. In four states (North and South Carolina, Virginia and West Virginia) public sector employees are denied access to collective bargaining. Per “Public Sector Labor & Employment Law Fundamentals” prepared for American Bar Association Labor Law Annual Conference 2007 [<http://www.abanet.org/labor/annualconference/2007/materials/data/papers/v2/067.pdf>]

²² Subdivision 1 of Section 210 of the *Civil Service Law*

²³ Subdivision 5(a) of Section 209 of the *Civil Service Law*

Attachment 2

TORONTO TRANSIT COMMISSION REPORT NO.

MEETING DATE: August 27, 2008

SUBJECT: Essential Service Review

INFORMATION ITEM

RECOMMENDATION

It is recommended that the Commission:

- (1) Receive this report for information, noting that staff's position is not to declare TTC as an essential service;
- (2) Note that staff will advise the Mayor and the City Manager of TTC's staff position with respect to essential service, for their appropriate action.

BACKGROUND

The Executive Committee referred to the City Manager the issue of declaring transit in Toronto as an essential service, and requested the City Manager, in consultation with the TTC and external experts, to prepare a report outlining the options for and the consequences of City Council formally requesting the Government of Ontario to designate transit in Toronto as an essential service, and that the report be prepared for the September meeting of the Executive Committee.

DISCUSSION

In Canada, there are three collective bargaining or dispute resolution models that have been recognized for resolving collective bargaining disputes. The three models are: the unfettered strike and lock out model (the Commission's current model); the no strike model (used by the hospitals, fire and police sectors in Ontario); and the designation model. The following provides a brief description of each model.

1. Unfettered Strike and Lock Out Model

This is the Commission's current model that is governed by the Labour Relations Act. Under this model, parties can utilize their economic power to resolve outstanding issues within the collective agreement. The parties can strike or lock-out as soon as they are in a legal position to do so. Normally, this is achieved at the expiration of the current collective agreement.

2. No Strike Model

This model prohibits, through legislation, strikes and lock outs and determines that all of the outstanding issues, for both parties, are resolved through arbitration. Under this model, the parties present their briefs or arguments before an interest arbitrator. The arbitrator will make decisions based on a number of key principles and criteria. The two specific principles the arbitrator will consider are demonstrated need and replication. The demonstrated need principle provides an opportunity for the parties to explain the need for a proposed change. The replication theory implies that the arbitrator must attempt to arrive at a decision or language that would most accurately reflect what the parties would have agreed to if left to continue to be engaged in the free bargaining process. The replication theory also draws heavily on the use of comparators between the proposed terms and conditions of employment and the terms and conditions of employment applied to similarly-situated parties or sectors.

In addition to the above noted principles, arbitrators may apply certain criteria when making a decision. These criteria could include the employer's ability to pay in light of its fiscal situation; the economic situation in the province and the city; and the employer's ability to attract and retain qualified personnel.

The no-strike model aims to protect public safety by prohibiting strikes and lock outs, while ensuring that all of the outstanding issues will be resolved by a neutral third party and incorporated into a collective agreement.

3. Designation Model

This model is a compromise between the unfettered strike model and the no-strike model. Under this model some of the services within the bargaining unit are designated as essential by the agreement of the parties, or failing agreement, a decision by a third party. The designation model aims to maintain parties' control over the content of a collective agreement while also protecting the public from loss of essential services, however, the final decision regarding the content of a collective agreement like the no strike model, could still be in the hands of a third party.

An example of the designation model can be found under the Crown Employees' Collective Bargaining Act ("CECBA"), which governs collective bargaining in the Ontario public service. In each round of collective bargaining, the parties involved must negotiate an essential service agreement. An essential services agreement should identify the essential services covered by the agreement and detail, and identify the number of employees necessary to provide the essential services. If parties are unable to reach an agreement, the parties can apply to the Ontario Labour Relations Board to resolve any outstanding differences they have with regard to the essential services agreement.

A second application of the designation model can be found under the Public Service Staff Relations Act (PSSRA). The PSSRA enables each bargaining unit to choose between the no-strike model and the designation model. The PSSRA requires that each bargaining agent, at the beginning of a round of negotiations, choose whether unsettled issues should go to compulsory interest arbitration or through the conciliation process, which could lead to a right to strike.

There is a further example in Montreal, where the transit sector is subject to the designation model. Montreal is the only place in Quebec where some employees within the public transit system sector have been considered to be “essential”. Montreal’s transit sector had a history of severe labour strife and multiple interruptions to its service. The high level of interruptions is evident considering that from 1970 to 1997, Quebec accounted for more than half of the working days lost through work interruptions in transit across Canada.

Quebec created the Essential Services Council (ESC) in 1982, following a long transit strike. The ESC is a third party that determines which employees are considered to be essential in situations where parties are unable to come to a consensus. In addition, the ESC is responsible for ordering and enforcing orders against parties who violate the governing legislation.

The ESC has held that while a strike leading to the elimination of buses and subways will not directly affect the health and safety of the public, it could indirectly do so during high traffic periods due to the congestion impeding the access of emergency vehicles. The Council has found that the only place in Quebec where this high level of congestion occurs is Montreal and that the only time that it occurs is during rush hour. As a result, the Council has determined that bus and subway drivers must provide full service during two three-hour periods on each weekday (early morning and late afternoon rush hours) and also during a two hour period near midnight for personal safety reasons during strikes.

The effect of the designated legislation has led to a significant decrease in service interruptions and labour strife for Montreal’s transit sector. Despite this, lawful and unlawful strikes do still occur. However, when they do, “essential services” are continued, which prevents unreasonable congestion, and in the case of unlawful strikes, unions are penalized.

Application of the Designation Model to Toronto

If Toronto was to adopt the Designation Model similar to the application in Montreal, it would first require a third party to oversee the dispute resolution if the parties could not agree or arrive at an ‘essential services agreement’. If we assume that an essential services agreement could be struck similar to the one in Montreal, then Toronto would have bus and subway rush hour service during the peak morning and afternoon periods. However, the designation model does have some disadvantages, namely:

- A Timely Process – one team has to negotiate what are the ‘essential services’ while another team has to negotiate the collective agreement;
- Loss of Focus – parties spend so much time negotiating ‘essential services’ that they can lose focus in regard to the real issues in the collective agreement;
- Longer Disputes – a strike can last longer due to the slight and not whole restriction on services;
- No Lockouts – while unions can engage in strikes for non-essential services, employers cannot lockout.

Cost Comparison of Unfettered Strike Model vs. No-Strike Model

A study was conducted in 1991 called “Collective Bargaining in the Public Sector: the Effect of Legal Structure on Dispute Costs and Wages.” This study reviewed information from contracts in existence within the Canadian public sector. The study concluded that the unfettered strike model results in lower wages than the no-strike model. The difference in wage settlements between the two models was approximately 6%. Under this scenario, if Toronto operated under the no-strike model during the 2005 negotiations wage settlements of 2.75/3.0/3.25% over the three year term could have been 2.9/3.2/3.3% or put another way, the total incremental cost of the contract over the three years could have been \$11.2 million more.

In light of the above discussion there are four factors to consider regarding the TTC being declared an essential service:

1. Being an essential service means there will be no strikes and no threats of a strike. As such, there will be no stress for employees and the public about the threat of a strike. Similarly, the significant inconvenience of a strike will be avoided.
2. Being an essential service has associated with it reduced incentive for both parties to reach a negotiated settlement. With either the no-strike or designation model, there is an unwillingness to negotiate at the bargaining table with the knowledge that a whole range of issues can be sent to arbitration with little downside risk – at least with the Union. However, with interest arbitration, the employer is at more risk. There is pressure on the arbitrator to “split the difference” between the position of the two parties to award wage increases and other monetary improvements in excess of those proposed by the employer in negotiations. All of this results in higher cost settlements through the interest arbitration process. This then leads to higher settlements in neighbouring jurisdictions whether or not those neighbouring jurisdictions have been declared an essential service. Even in cases where an arbitrator is obligated to take into account “the ability to pay,” this has not had a significant effect on arbitrators’ decisions. It is also highly unlikely that the surrounding or neighbouring jurisdictions would be declared an essential service given the size of their operation. However, we do experience the constant “leap frogging” of wages and benefits in the surrounding jurisdictions, and potentially with the largest jurisdiction being declared an essential service, this practice would continue with little recourse to bring it under control.
3. Being an essential service also results in non-monetary issues or work practices, many of which are technical and complicated, and are best addressed by the two parties, being decided by an arbitrator who may not fully appreciate the impact of these issues on the operation. The risk lies more with the employer, as those decisions are very difficult to change and there is the potential that they can negatively impact the management rights clauses in a collective agreement.
4. There is one final factor to consider. The current model provides for the parties to engage in free collective bargaining to reach a collective agreement that both parties can work with under the life of the contract. The current process always has the opportunity of either party, once in a legal strike position, to seek the Ministry of Labour to intervene with proposed back-to-work legislation. This is still a very powerful tool to be used by both

parties to engage in meaningful discussions to reach a negotiated settlement. This, ultimately, is the desired outcome when entering collective bargaining discussions.

JUSTIFICATION

Based on all the above issues, we believe that the TTC, the City and its residents would be best served by not declaring TTC as an essential service, but by leaving the situation as it is today.

August 6, 2008

Attachment 3

Research on Essential Service Settlements and Compulsory Arbitration

Ponak and Falkenburg (1989) reported that the overall average negotiated rate of settlement under compulsory arbitration is approximately 75% (i.e., an average of 25% of the negotiations end up in arbitration). This was well below the estimated average negotiated settlement rate of 93% for public sector strike-based systems and 95% for overall strike based systems (i.e., only 5 to 7% of the negotiations end up in a strike/lockout). These results support the view that compulsory arbitration has a direct negative effect on the parties' ability to bargain a new agreement.

The gap in overall settlement rates in Ontario between compulsory arbitration and strike based systems is about 32%. Part of the rationale for this gap may rest in the view that arbitration provides substantially lower dispute costs in contrast to strikes²⁴, and the fact that the parties impetus to bargain does not increase as they get closer to a culminating point (i.e., strike deadline date).

Effects of Compulsory Arbitration on Collective Bargaining

The following issues have been identified in the research literature regarding the effect of compulsory arbitration on the collective bargaining process:

- The impetus to effectively bargain is adversely affected by the parties' perception of the arbitration process i.e., perception that arbitrators tend to split the difference;
- There is what is called the "chilling effect" with mandatory arbitration where the parties do not "compromise during negotiations in anticipation of an arbitrated settlement";
- There is a known "narcotic effect" with mandatory arbitration that reflects "an increasing dependence on an arbitrated settlement" with each party having a growing loss in their perceived ability to successfully negotiate a new agreement;
- There can be a "parasitic effect" that arises when a settlement is based on another arbitrator's award rather than labour market comparability criteria; and
- The intensely political atmosphere surrounding bargaining can encourage the parties to use the arbitration process as a face-saving device (i.e., don't blame us, blame the arbitrator).

Interest Arbitration can be used as a method of settlement when issues cannot be resolved between the parties. Two basic forms of interest arbitration exist.

Under conventional interest arbitration, the arbitrator hears both sides and then renders a decision that generally is a compromise somewhere between what the union is demanding and what the employer is offering. In this type of arbitration, the argument is the arbitrator often splits the difference between the parties, as a result where it is expected that they will go to arbitration, the parties take extreme positions making voluntary settlement difficult.

Footnotes

²⁴ Piczak, Michael, "Settlements rates and settlements stages in compulsory interest arbitration" Industrial Relations, Sunday September 22, 1996

An alternative approach is final offer selection approach to arbitration. Under this approach the arbitrator must select one side or the other without compromise. The theory is that both parties will compete to appear reasonable in their offers since the arbitrator will pick the most reasonable position of the two. It is argued under this approach, the parties are more likely to come up with their own negotiated settlement where they will tend to converge on reasonableness.

Arbitration's most visible attribute is the ability of its binding award to guarantee (almost) the absence of strikes among covered employees and hence to prevent the interruption of covered public services.

The usual test for whether arbitration has protected the public is to compare strike occurrences in jurisdictions with and without arbitration. The evidence shows that far fewer strikes occur where arbitration is mandated.

However, mandatory arbitration does not protect against wildcat strikes or against stoppages over issues outside the scope of the bargaining and, as the Montreal police demonstrated in 1969, it may not always prevent an unusually militant union from striking in defiance of an unsatisfactory award.²⁵

Arbitration may be a too easily-used escape route from the difficult trade-off choices that must usually be made in order to negotiate an agreement. Arbitration will be invoked because one or both sides believe that an arbitration award may be more favourable than a negotiated agreement and because one or both believe the costs of using arbitration are comparatively low (none of the trauma and costs of a work stoppage and none of the uncertainty of using other forms of political influence).

Mandatory Arbitration

In New York the research states that compulsory "Interest Arbitration" for Police and Firefighters has tended to drive up salaries for uniformed services while hindering creative approaches to improving efficiency and reducing costs. Compulsory arbitration promoted a salary surge by creating an incentive for many government employers and their unions to simply "disagree" and let the arbitrator decide. Arbitration made it possible for some government employers to steer contract talks towards "imposed" settlements where the cost otherwise would have been difficult to defend before voters.

Conversely, employers would settle on terms they would otherwise find unacceptable out of fear that an arbitrator would award an even worse result.²⁶ This ignited a vicious cycle: since arbitrators often attached insufficient importance to a community's ability to pay higher salaries, poorer municipalities suffered the ripple effect of generous precedents set by richer areas. Other arbitrators ruled that the taxing ability of municipalities translated into ability to pay.

²⁵ Feuille, Peter, "Selected Benefits and Costs of Compulsory Arbitration", Industrial and Labour Relations Review, Vol 33, No 1, (October 1979) Cornell University

²⁶ O'Neil, Terry O and E.J. McMahon, Taylor Made: The cost and consequences of New York's public-sector labour laws, October 2007, Empire Centre for New York State Policy

Compulsory arbitration is a frequently used alternative to prevent strikes and lockouts however there is widespread concern that it weakens collective bargaining and leads to costly awards. There is evidence that banning the right to freely bargain a contract may lead to more expensive forms of conflict including absenteeism, slowdowns, work to rules, grievances and illegal strikes which are likely to be more intense and prone to unruly behaviour.²⁷

In order to determine that an industry is “essential”, factors that are considered include: the manner in which the industry has been treated in previous labour disputes; the industry is affected to an unusual degree with the public interest; a work stoppage in that industry will affect a large number of people or put in peril national defence or security, health, person, property; settlement will impose costs directly or indirectly on the public; or public opinion is sufficiently aroused to create pressure for settlement.²⁸

On September 11, 2008, the C.D. Howe Institute released a report entitled; No Free Ride: The Cost of Essential Services Designation. This report provides the following conclusion; “*Canadian evidence suggest that declaring a public service essential increases the cost of negotiated wage settlements, fuels wage growth across sectors – and does not guarantee that crucial services will be provided in the event of a strike.*”²⁹

The report states that their research indicates the effect of declaring a service essential leads to an increase of up to 0.8 percent in the average hourly wage. In applying these results to the TTC, the report concludes that an essential service designation would increase the annual labour expenditures by \$6 million and over a three-year contract by \$23 million dollars.

The report further identifies that the designation has increased the probability of there being a partial strike by approximately 5 percent, relative to there being no law on service designation³⁰. As an example, since the introduction of essential services legislation in 1982, hourly real wages for Montreal transit workers are 6 percent higher compared to the national average of 4 percent for public employees. Also, transit strikes in Montreal have also been ended with provincial legislation at least twice since they were designated essential in 1982.

Other Arbitration Approaches

A less common method is that used by the LACMTA (LA Transit Authority) and ATU which is the binding-nonbinding arbitration option. The two parties would submit their proposals to an arbitration process. A decision would then be rendered, but either side could reject it by a supermajority vote. Both parties are involved in the design of the binding-nonbinding process. Issues that they determine include the level of the supermajority vote that would have been needed

²⁷ Adell, Bernard, Michael Grant and Allen Ponak. Strikes in Essential Services. Kingston, Ontario; 2001, Queen's University Press

²⁸ *ibid*

²⁹ Dachis, Benjamin. No Free Ride: The Cost of Essential Services Designation, September 11, 2008, C.D. Howe Institute

³⁰ *ibid*

to reject the award, the method of choosing arbitrators and the size and compensation of the arbitration panel, and the type of arbitration (conventional vs. Final offer).

Under the *Los Angeles Public Transportation Labour Disputes Act*, either party to a dispute can request gubernatorial intervention. It is then up to the Governor to determine if a strike or lockout would “significantly disrupt public transportation services and endanger the public’s health, safety, or welfare.”³¹

³¹ Edelman, Edmund D, Daniel J. B. Mitchell and Ho-su Wu. Dealing with public-sector labor disputes: An alternative approach for California, Unknown

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