

EX15.12.1

Hi,

I am doing a deputation tomorrow (Tues Jan 24th) re: essential service.

I have attached a document that I would like to submit for all the Councillors information if at all possible - it is not my deputation, just important info relevant to the agenda item.

Thank you,

Roberta Scott

ONTARIO LABOUR RELATIONS BOARD

2331-11-M The Corporation of the City of Toronto, Applicant v. Toronto Civic Employees Union, Local 416, Responding Party.

BEFORE: James Hayes, Vice-Chair.

APPEARANCES: John Saunders, Matthew Scott, Paul Raftis, Alan Craig, Garrie Wright, Gord McEachen, Andrew Zabrovsky, Issie Berger and Bob Reynolds appearing for the applicant; Howard Goldblatt, Lindsay Lawrence, Mark Ferguson, Jim Witteveen and Grant Dart appearing for the responding party.

DECISION OF THE BOARD: January 12, 2012

1. This is an application filed by the Corporation of the City of Toronto (the "City" or the "employer") pursuant to section 9 of the *Ambulance Services Collective Bargaining Act, 2001* (the "Act"). It names the Toronto Civic Employees Union, Local 416 ("Local 416" or the "Union") as the responding party.

2. The application requests among other things that the Board determine the number of ambulance workers ("paramedics") who may be required to work for the City in the event of a lock-out or strike.

3. The proximate event, which may occur, is a lock-out called by the employer.

4. Local 416 advises that it does not intend to call a strike in this round.

Background

5. The City and Local 416 are engaged in bargaining to renew their collective agreement. The agreement contains an expiry date of December 31, 2011.

6. Section 3 of the Act requires that the City and Local 416 negotiate an essential ambulance services agreement ("EASA").

7. Subsection 3(5) of the Act requires that parties bargain in good faith and make every reasonable effort to make an EASA.

8. Section 9 of the Act permits either an employer or a trade union to apply to the Board for a determination of any matter which they have not resolved concerning an EASA.

9. The Board was advised that the parties had met on a minimum number of occasions and that the discussions had been unsuccessful. It does not appear that either party requested the appointment of a conciliation officer, in connection with EASA bargaining, as section 7 of the Act contemplates may occur. The parties came to the Board with no issues resolved. It is by no means clear that serious efforts had been made to settle an EASA.

10. I considered suggesting further direct party negotiations with mediation assistance if required. However, both the Union and the employer were represented by very senior counsel. Neither saw potential value in delaying the hearing of the application. I took their advice.

11. The Board may do otherwise in future cases. The Act contemplates good faith EASA bargaining, a process which should be respected and is expected. Disputes such as these should not normally arrive at the Board without significant prior effort to resolve them by the parties themselves.

Process

12. Local 416 sought a pre-hearing Board production order for relevant statistical data. Prompt compliance by the employer with a focussed Union request permitted this application to be addressed in an efficient manner. The material provided by the City was extremely well prepared and helpful.

13. The Registrar scheduled this matter for a consultation as opposed to a more formal hearing. A consultation permits the Board to consider an application in an expedited fashion, typically on the basis of briefs supported by oral submissions. Witnesses are permitted only with leave of the Board.

14. In this case the parties were offered the opportunity to call evidence, or, to require cross-examination on any aspect of the other's brief. Neither the City nor Local 416 elected to do so.

15. The consultation was conducted on December 5 and 19, 2011. Counsel for the City responded on January 8, 2012 to additional requests for information made by the Board and with 2011 year-end statistics which were then available.

Limits to Board Jurisdiction

16. Reasonable people may disagree as to whether all paramedics in the City of Toronto should be declared to be "essential". Police, firefighters, and various other public sector employees have their terms and conditions of employment determined by interest arbitration. Strikes and lock-outs in such cases are prohibited. It is for others, not the Board, to express an opinion on the question of interest arbitration for paramedics. From the Board's point of view, the Legislature decided that question over ten years ago. Lock-outs and strikes affecting paramedics are permitted.

17. There are certain conditions that apply to a work stoppage of this kind. Most notably, the Legislature requires that "essential ambulance services" must be provided whether or not a strike or lock-out occurs. A responsibility of the Board is to decide the number of ambulance workers who are required to provide "essential ambulance services" as contemplated by the Act — if the parties fail to agree.

Local 416 and Interest Arbitration

18. The position of Local 416, reiterated before the Board, is that the Union will concede that all of its paramedics are "essential" so long as it receives interest arbitration in return.

19. I understand the offer to be that, if the City agrees to interest arbitration for the employees in the City's Emergency Medical Services Division ("EMS") in the Local 416

bargaining unit, the Union will agree that *all* of those employees will work during any 2012 lock-out of the Local 416 bargaining unit should such occur.

20. The City is not prepared to voluntarily agree to interest arbitration for paramedics.

21. As the legislation is now written, the City is entitled to refuse the Union's offer of interest arbitration. It is permitted at the same time to maintain its position that paramedics should continue to provide all of the emergency services normally available to the public — even should it lock out the rest of the Local 416 bargaining unit.

22. Similarly, Local 416 is entitled to maintain its position that all paramedics should be declared essential as a matter of public policy, but, that far fewer are actually needed to ensure "essential ambulance services" are maintained as the Act now stands.

23. The City and Local 416 may make lawful collective bargaining and EASA litigation choices in their own interest. No doubt there will be political consequences for whatever positions are taken by the City and the Union. The public may, or may not, understand why strikes or lock-outs affecting paramedics are permissible at all.

24. To be absolutely clear, the Board has no jurisdiction to impose interest arbitration upon the City given the provisions of the Act and the composition of the Local 416 bargaining unit.

25. It should be recorded, however, that Local 416 has offered a proposal whereby the City would have access to *all* of its EMS employees during any strike or lock-out which may occur. There may well be good reasons why the City has not accepted the Union's offer. It is not the function of the Board to express an opinion.

26. The failure of the parties to reach a voluntary EASA, or the refusal of the City to accept the Local 416 option, means that the Board is required to determine the number of ambulance workers required to provide essential ambulance services as required by the Act.

27. For reasons set out below, the Board has concluded that the Act requires that the number of ambulance workers be set at a level below the full complement sought by the City but above that proposed by the Union.

28. The parties may, or may not, wish to reconsider their respective positions in that light. Local 416 has made a proposal which would permit *all* paramedics to work throughout any lock-out. In the alternative, persons from both sides with direct EMS experience could still develop a voluntary EASA even at this stage.

Scope of this Decision

29. An EASA typically includes clauses which address a number of practical and legal issues. Although they have failed to date to agree upon any of these issues, the parties are agreed that this decision need determine only one question at this time.

30. They have asked that the Board settle the number of ambulance workers who will be required to work during 24-hour periods commencing at 7:00 a.m. on Mondays ending at 7:00 a.m. on Saturdays ("weekdays") and during 24-hour periods commencing at 7:00 a.m. on Saturdays and ending at 7:00 a.m. on Mondays ("weekends").

31. The City has withdrawn its request that certain other Local 416 classifications, in addition to ambulance workers, be required to work by an EASA.

32. The parties are agreed that the Board should remain seized with respect to all other matters.

Positions of the Parties

City of Toronto

33. The City submits that the Board should order that a full complement of normally scheduled paramedics work in the event of a lock-out or strike. The employer states that a 100% complement means that 319 paramedics should be at work on weekdays and 274 paramedics should be at work on weekends.

Local 416

34. Local 416 relies upon a July 4, 2002 decision of former Chair Kevin Whitaker ("the Whitaker decision") which settled the number of paramedics at 225 for weekdays, and 175 for weekends. It submits that these numbers should be increased by a maximum of 5%, the number which the Union says reflects the increase in overall ambulance call volume since 2001.

35. As previously stated, the Board has no jurisdiction to entertain the primary Union position and no further comment will be made with respect to it.

Relevant Statutory Provisions

36. Subsection 1(1) of the Act contains the following definitions:

1. (1) In this Act,

"ambulance" has the same meaning as in the *Ambulance Act*;

"ambulance worker" means,

- (a) an employee who is an emergency medical attendant or a paramedic, as defined in the *Ambulance Act*,
- (b) an employee whose duties include dispatching ambulances, or
- (c) an employee prescribed as an ambulance worker by a regulation made under this Act;

"essential ambulance services" means,

- (a) ambulance services provided to,
 - (i) persons who have suffered a trauma or an acute onset of illness, either of which could endanger their life, limb or functioning, or
 - (ii) persons who have been judged by a physician or a physician's delegate to be in an unstable medical condition and to require, while being transported, both the care of a physician, a nurse, another health care provider, an emergency medical attendant or a paramedic and the use of a stretcher,

- (b) call-taking and dispatching services required for the provision of ambulance services,
- (c) if the employer provides integrated dispatching services, call-taking and dispatching services required for the provision of fire protection services or police services or both,
- (d) work that is incidental to a service described in clause (a), (b) or (c),
- (e) work that is performed on or in connection with an ambulance to protect health or safety, or
- (f) the prescribed services;

"essential ambulance services agreement" means an essential ambulance services agreement under section 4;

It is agreed by counsel that clause (a) of the "essential ambulance services" definition is the clause which is applicable to this application.

37. The other relevant statutory provisions are as follow:

- 4. (1) An essential ambulance services agreement shall,
 - (a) set out the number of ambulance workers who are required to provide essential ambulance services;
 - (b) provide that the required number of ambulance workers shall continue working during any strike or lock-out of employees in the bargaining unit of which they are members;
 - (c) for the purposes of the definition of "essential ambulance services" in subsection 1(1),
 - (i) specify the work that is incidental to a service for the purposes of clause (d) of that definition,
 - (ii) specify the work that is performed on or in connection with an ambulance to protect health or safety for the purposes of clause (e) of that definition, and
 - (iii) specify the work that is necessary to carry out a prescribed service referred to in clause (f) of that definition;
 - (d) identify the ambulance workers who will provide essential ambulance services under the agreement and the additional ambulance workers who will be subject to being called in to work under section 5; and
 - (e) set out the order in which the ambulance workers referred to in clause (d) shall be called in to work.
- (2) The number of ambulance workers that are required to provide essential ambulance services shall be determined without considering

whether other persons are available to provide the essential ambulance services.

8. (1) An essential ambulance services agreement remains in effect until terminated by the employer or the trade union in accordance with subsection (2).

(2) A party may terminate the agreement, by giving the other party written notice of its termination, if the parties have a collective agreement and there are at least 190 days left in its term.

9. (1) An employer or a trade union required to make an essential ambulance services agreement under section 3 may apply to the Board for a determination of any of the matters they have not resolved.

(2) Upon the application of either party, the Board shall,

- (a) determine any matters to be included in an essential ambulance services agreement;
- (b) order that terms specified by the Board be deemed to be part of an essential ambulance services agreement;
- (c) order that the parties be deemed to have entered into an essential ambulance services agreement; and
- (d) give any other directions the Board considers appropriate.

(3) The Board may consult with the parties to attempt to resolve any matter raised by the application or may inquire into any matter raised by the application, or it may do both.

(4) The Board may make any interim or final order it considers appropriate after consulting with the parties or on an inquiry.

(5) On a further application by the employer or trade union, the Board may modify any determination, order or direction if there is a change in circumstances.

10. (1) The parties to an essential ambulance services agreement may amend the agreement.

(2) A party to an essential ambulance services agreement may apply to the Board to amend it.

(3) On an application under this section, the Board may amend the essential ambulance services agreement and may make any other determination, order or direction it considers appropriate in the circumstances.

12. (1) The ambulance workers in a bargaining unit containing ambulance workers shall not strike and the employer shall not lock them out unless,

- (a) an essential ambulance services agreement between the employer and the trade union that acts as bargaining agent for the employees is in effect; and

(b) a strike by or lock-out of the employees would be lawful under the *Labour Relations Act, 1995*.

(2) Nothing in subsection (1) affects the right of employees in the bargaining unit who are not ambulance workers to strike or of the employer to lock them out if a strike by or lock-out of the employees would be lawful under the *Labour Relations Act, 1995*.

Submissions by the Parties

38. The submissions of the parties which follow have been presented in an abbreviated and paraphrased form.

City of Toronto

Onus

39. The employer points out that the previous EASA between the parties was terminated by the City on May 12, 2011 — prior to notice to bargain being served — in accordance with subsection 8 (2) of the Act. The 2009 EASA has expired. The Act contains no ‘freeze’ provision which might otherwise leave an EASA in place until it is replaced by a new one. The Act specifically contemplates that an EASA remains in effect only until properly terminated. The City submits that there is a “blank sheet of paper” before the Board.

40. The City says that the Whitaker decision is of no precedential value. It simply represents a piece of evidence illustrating what happened in the past. The decision establishes no starting line for the assessment of what may be required in 2012. The facts have changed substantially.

41. There is no equivalent in the Act to subsection 39(1) of the *Crown Employees Collective Bargaining Act (“CECBA”)* which places the legal burden upon a party who wishes to establish that any particular service is “essential”.

42. The opposite is the case for ambulance workers. Unless the Union convinces the City or the Board otherwise in an EASA, all paramedics are required to work during a lock-out or strike. “The default position under the Act is that 100% of the paramedics are required to work” says Mr. Saunders. Accordingly, the City asserts that Local 416 bears the legal onus.

Principal Argument

43. On the merits, the City grounds its argument upon the statutory definition of “essential ambulance services” set out above.

44. Counsel observes that the “language of the definition is as broad as it could be”. He submits that the definition is more than sufficient to cover *all* of the emergency services currently provided by the City.

45. The following document was filed with the Board. It ranks ambulance services into categories of incident priorities ranging from Echo (the most serious) through to Alpha 3 (the least serious). The document also refers to non-emergency scheduled transfers and two other codes.

Toronto EMS Definition of Incident Priorities

Toronto EMS / Ministry of Health: Priority Mapping Table

	TEMS Response Priority	TEMS Response Time Target (min)	TEMS Response Plan	Most common incidents:	Ontario MOH Provincial Response Priority Code
EMERGENCY / 911	Echo	08:59	Closest Unit, ALS Mandatory	Choking, Cardiac arrest (<i>identified early by EMD</i>)	Code 4
	Delta	08:59	Closest Unit ALS Preferred	Choking, Cardiac arrest, chest pain, SOB, unconscious, pedestrian struck, roll-over PI	Code 4
	Charlie	08:59	Closest Unit ALS Preferred	Abdo pain with fainting, not alert, suspected AAA, diabetic not alert, sudden onset headache, OD not alert, stroke with speech or visual problems	No equivalent MOH Response Priority Code (sic)
	Bravo	10:59	Most Appropriate Unit in 10:59 BLS Preferred	Falls & traumatic injuries (possibly dangerous body area, serious hemorrhage), traffic accident (with injuries, serious hemorrhage), syncope now alert, assault/sexual assault (possibly dangerous body area, serious hemorrhage)	No equivalent MOH Response Priority Code
	Emerg Transfer	10:59	Most Appropriate Unit in 10:59 BLS Preferred	Emergency Transfer from one hospital to another. Lights and Siren response to transfer critical patient.	No equivalent MOH Response Priority Code
	Alpha	20:59	Most Appropriate Unit in 20:59 BLS Preferred	No Priority Symptoms: minor falls, abdo pain, seizure now alert, flu symptoms, other minor complaints, etc.	Code 3
	Alpha 1	30:00	Most Appropriate Unit in 30:00 BLS Preferred	Nursing Homes where a nurse or doctor are requesting a response within 30 minutes (appropriate based on the patient condition). These would otherwise be Alpha or Bravo priority.	Code 3
	Alpha 2	60:00	Most Appropriate Unit in 60:00 BLS Preferred	Nursing Homes when a nurse or doctor are requesting a response within 60 minutes (appropriate based on the patient condition). These would otherwise be Alpha or Bravo priority.	Code 3
	Alpha 3	120:00	Most Appropriate Unit in 120:00 BLS Preferred	Nursing Homes where a nurse or doctor are requesting a response within 120 minutes (appropriate based on the patient condition). These would otherwise be Alpha or Bravo priority.	Code 3
	Courtesy Code 2	When Possible	Most Appropriate Unit when possible BLS Preferred	Caller requesting assistance to lift patient. No injuries reported. (fallen cant get up)	Code 3
Non-Emergency	Scheduled Transfer & Code 2 Transfer	Scheduled Pick-up time or as requested	Dedicated transfer Ambulance if available (M-F 7-7) otherwise BLS ambulance	Non emergency transfers for scheduled appointments, clinics, return home from hospital, aircraft transfers, etc.	Code 1 or 2

2012 CanLII 974 (ON LRB)

This is Non-Emerg

46. Mr. Saunders submits that all calls coded as “emergency” calls meet the definition of “essential ambulance services” under the Act. These calls include categories Echo through Alpha 3 and those classified as Code 2-Emergency. The City explains that Code 2-Emergency refers to emergency transports requiring service within 10 minutes of a specified time — usually originating at an emergency department or critical care facility, or from an airport/helipad in rendezvous situations with a helicopter or fixed wing aircraft. In the result, the City is entitled to an order that 100% of its paramedics be required to work in the event of a labour disruption.

47. The City filed another lengthy document which lists brief descriptions of the type of incidents which are included within the various categories from Echo to Alpha 3 and the number of such incidents which were projected to have occurred by the end of 2011. This document was prepared before final 2011 year end statistics were available.

Comments on the Facts

48. Anticipating Local 416's reliance upon the Whitaker decision, the City emphasizes that there has been an increase of 5% in overall ambulance call volumes since 2002. The increase in call volumes alone is sufficient to render that decision of no relevance in counsel's submission. Final statistics show an increase in total call volume of 7.2%.
49. More importantly, the City stresses that the mix of ambulance services has changed fundamentally since 2002. In 2002, former Chair Whitaker dealt with 2001 statistics. At that time, non-emergency calls represented approximately 22% of the total call volume. By way of contrast, the number of non-emergency calls for 2011 has now been reduced to 4.5% of the total. Final statistics show 4.4%.
50. The Whitaker decision reduced the number of working paramedics by 25% during the 2002 strike. The 25% reduction in complement was made at a time when approximately 22% of the total call volume was attributable to 'non-emergencies', principally transfer calls. There is now far less 'flex' in the ambulance system than there was in 2001. Mr. Saunders emphasizes that the Whitaker 25% reduction, if applied today, would cut deep into the ability of the City to respond to 'emergency' calls.
51. In support of this explanation the City submitted a bar chart at the December 19, 2011 consultation. In late December, I requested that the chart be supplemented. An updated bar chart and table, received on January 8, 2012, are attached to this decision and marked as Appendices 1 and 2.
52. In the City's submission, the chart demonstrates how the 25% Whitaker decrease in paramedic complement related to the mix of emergency and non-emergency calls as that mix existed in 2002. The chart shows, counsel says, that the 25% Whitaker decrease cut beyond the non-emergency category into the Alpha category only marginally. A reduction of that significant 25% proportion was only possible due to 'flex' in the system. The City could cope with the Whitaker reduction by reducing the number of non-emergency transfer calls.
53. If one were to apply the Whitaker formula to the situation in 2012 (which the City does not concede is appropriate) any reduction in complement should not exceed the percentage of non-emergency call volumes which remain. This would lead to a maximum reduction in essential ambulance workers by 4.5% — to a weekday number of 305, from the 319 the City was requesting, said Mr. Saunders.
54. Adding to the stress on the system — even outside of a lock-out or strike situation — Mr. Saunders noted that there has been an increase in paramedic complement by only 1% since 2002.
55. Response times are determined by the number of available ambulances and the location of those ambulances. Paramedics do not leave Alpha calls on the pavement to reach Echo patients. Even now the City is not meeting its time targets for responding to calls.
56. Not only that, there has been a significant increase in service times per call since 2002 for a variety of reasons.
57. All of these factors point to the need for a significant increase in the number of paramedics who should be required to work in the event of a labour disruption. A decrease in the number of available paramedics during a labour disruption would only make an existing "bad situation worse" submits counsel.

Submission of Local 416

2002 Whitaker Decision

58. The Union relies upon the 2002 Whitaker decision. Local 416 emphasizes that the City accepted that determination in 2005, and again in 2009 when a lengthy strike took place.

59. Mr. Goldblatt submits that the Board should require “clear evidence of demonstrable need to make a radical departure from the Whitaker order, and from the numbers set out therein, which the parties themselves agreed to retain as recently as in 2009”.

60. Counsel states that all of the same arguments now made by the City were available in 2009 when it confirmed the Whitaker decision as providing adequate numbers of paramedics. The same Act as now was then in place.

61. The City was prepared to apply the Whitaker EASA in 2005 and 2009 notwithstanding the fact that there was a 5.5% increase in emergency calls between 2001 and 2005, and a 9% increase between 2005 and 2009. These increases did not cause the City to reject the applicability of the Whitaker numbers.

62. The Union accepts that there has been a further increase in emergency calls from 2009 to the end of 2011 (projected) of 7.7% for Echo, Delta, and Charlie calls. If Bravo calls are added, the total increase is 8.4% from 2009. However, now the City is seeking a 50-70% increase in the use of paramedics during a labour disruption from the 2009 EASA.

63. In effect, Mr. Goldblatt suggests that all that has changed since 2009 is the political climate not the fundamental facts. The baseline for any change should be the Whitaker decision which was adopted without adaptation in 2009. There is no argument available, says counsel, to increase the Whitaker number of “essential” paramedics beyond 8% even if one adds Bravo to the increased Charlie, Echo, and Delta call volumes.

Principal Argument

64. Local 416 submits that the Act itself makes it clear that the Legislature did not envisage ‘business as usual’ for paramedics during a strike or lock-out.

65. The very structure of the legislation requires the Board to make a distinction between what might be regarded as normal emergency cases (‘business as usual’) and “essential ambulance services” within the meaning of the Act. It is that line which must be drawn.

66. All of the emergency services provided by the City are required to a greater or lesser extent all over the province. If the statutory definition of “essential ambulance services” is as broad as the City suggests, there is no daylight between ‘business as usual’ emergencies and “essential” services. No paramedics anywhere would have the right to strike or could ever be subject to lock-out. There would be no need for the Act at all. Section 5 which provides for an increase in ambulance workers in the case of “unanticipated emergencies” is read out of the Act if Mr. Saunders is correct, in the Union’s submission.

67. Local 416 submits instead that the statutory definition of “essential ambulance services” should be interpreted to include the Echo and Delta categories, perhaps Charlie, but definitely not Bravo and Alpha.

Comments on the Facts

68. Local 416 points to statistics produced by the City in response to the Board production order. The Union also relies upon the recently announced City of Toronto 2012 Budget and, in particular, the explanatory material set out in the Emergency Medical Services Operating Budget Analyst Notes.
69. The Union discerns no significant difference between the facts as they existed in 2009, when it says the City agreed to implement the Whitaker decision, and the situation presented today. Indeed, Mr. Goldblatt submits that key statistics from the 2009 strike period demonstrate that the Whitaker order worked well and should not be disturbed.
70. Local 416 relies upon a table which is marked as Appendix 3 to this decision. It sets out the median response times of ambulances to call sites during the 2009 strike period, and for comparative years. The table should be read together with the incident priority document set out above which includes the City's Response Time Targets for categories Echo through Alpha 3.
71. For Echo and Delta calls (the most serious), Mr. Goldblatt points out that the median 8:59 minute target response time was met in all time frames recorded during the 2009 strike. In some cases, ambulances responded even more quickly during the strike period than in years when there was no strike.
72. For Charlie and Bravo calls, the statistics show little difference in response times as between the 2009 strike period and comparable periods in 2008, 2010, and 2011.
73. Mr. Goldblatt acknowledges that significant differences do show with respect to the Alpha categories which, he says, is not surprising. Alpha cases, in his submission, fall well outside the statutory definition of "essential ambulance services". That is what one would expect to see when the number of paramedics is contracted. This is what application of the Act entails.
74. The same result is identified if one examines the table marked as Appendix 4 to this decision. It illustrates response times achieved at the 90th percentile. Selection of the 90th percentile is apparently a standard industry measure designed to eliminate distorting statistical outliers.
75. The Union also relies upon the table marked as Appendix 5 to this decision which presents similar data in a different form. The document illustrates the varying percentages of occasions when target response times were met at the 90th percentile. This table demonstrates that overall target response times are not being met by the City whether or not there is a strike in progress.
76. In the case of Charlie calls, Local 416 points out that the City is prepared to live with 36%, 29%, and 31% compliance at the best of times. Once again, the exhibit demonstrates, in the Union's submission, that the negative impact of the Whitaker decision from normal expectations was relatively marginal.
77. Local 416 also points to the City's 2012 Budget documents.
78. Those documents recommend that: "hiring of the equivalent of 36 vacant paramedic positions be deferred for 2012. EMS will have to reduce 6.5 ambulances on a 24-hour period. The decreased vehicle count will reduce the availability of ambulances for emergency calls, which will result in increased distances traveled for ambulance vehicles". The projected

36 vacancies are drawn from an average attrition rate of 3 paramedics per month or 36 paramedics per year.

79. The budget document records that: "in 2011, EMS arrived at critical calls within 8:59 minutes in 62.9% of cases". It states that the 2012 proposed service levels will reduce this number to 60% of cases. The document also records that: "in 1996, Toronto EMS arrived at life threatening emergency calls in 8:59 minutes 84% of the time".

80. Mr. Goldblatt submits that the 2012 Budget demonstrates what the City is prepared to accept concerning response times. It is not the task of the Board to set standards for the delivery of ambulance services. However, it is simply not reasonable for the City to propose that it should do better than 'business as usual' during a labour disruption.

City of Toronto Reply

81. The employer rejects Local 416's reliance upon both the 2009 EASA and the 2012 Budget.

82. The City had an application pending before the Board to amend the 2009 EASA when the strike ended. While the City accepted the Whitaker decision at the outset of the strike, it had not worked. Local 416's factual premise is therefore incorrect. The City did not accept the Whitaker decision as appropriate in 2009. The City's initial acceptance in 2009 provides no basis for suggesting that the Whitaker decision should comprise a starting line for any 2012 assessment.

83. The 2012 Budget remains a hypothetical projection. It has not yet been accepted or implemented. If the ambulance service is ultimately required to accept the proposed cuts, other decisions may be made. For example, transfer calls may be further eliminated.

84. Insofar as call volumes are concerned, it is important to note that, while there has been a 5% increase in overall calls since 2001 [the final number is 7.2%], the important figure to note is that there has been a 31% increase in emergency calls. This has made things far worse. For reasons previously given, any reduction from full complement should at the maximum replicate the 4.5% [final number is 4.4%] of non-emergency calls now made by City ambulances. Although the City requests that the full complement of paramedics be maintained, this is the only possible flex available.

Local 416 reply

85. The task of the Board is to put in place a system "which does not jeopardize the right to strike except in the case of essential services". The "essential ambulance services" definition "can't be read as all-inclusively as Mr. Saunders' submits" without reading out the right to strike from the Act.

86. The 2009 strike went on for a long time. The Whitaker formula was accepted by the City until the last moment of the strike. The 2012 Budget is the City's current public position as to what may be deemed acceptable for response times.

87. The City has provided no explanation as to why the problems it now speaks about could be tolerated during the 2002-2009 period but are currently intolerable. The City has not explained why it accepts the response times and percentile compliance which it does. Alpha and Bravo categories are non-essential and response times concerning them will be met at an acceptable level using the Union's proposed numbers. Target response times are not being met

now. The evidence does not show that there was a measurable difference, or an unacceptable level of emergency response times, during the 2009 strike period.

Decision

Legislature's Policy Choice Must be Respected

88. The Legislature has decided that free collective bargaining with respect to paramedics should be maintained so far as possible. There is no ambiguity here.

89. The Act provides a comprehensive, somewhat complex, framework which is intended to reconcile the competing policy interests of protecting free collective bargaining in an environment where everyone agrees that "essential ambulance services" must be maintained during any labour disruption. It was fairly described as a "compromise piece of legislation" by Mr. Saunders and a "balancing act" by Mr. Goldblatt.

90. Public safety must always be a prominent, perhaps the dominant, consideration. But the Act also dictates that the public interest in free collective bargaining be protected. It is not a question of giving timid tepid lip service to labour relations considerations. Free collective bargaining assumes that there *will* be negative repercussions in strike or lock-out situations.

91. Indeed this is what the Act is all about. It does not offer the City the option to lock out whomever it chooses, and to keep whomever it chooses working, even if they are paramedics. Neither does it offer the Union the option of enhancing its bargaining position by taking all of its paramedics out on strike whatever risk that may pose to public safety.

92. Nor does the Act offer the possibility of Board ordered interest arbitration for a paramedic group which comprises less than 25% of a composite bargaining unit as is the case here.

93. It falls to the Board therefore to respect the policy choice of the Legislature and to attempt to balance the competing interests at play in the manner that the Act requires.

Onus

94. There is no need to address this question in this case. It is difficult to imagine that there will be many, if any, cases of this kind which will turn on the burden of proof.

The Whitaker Decision

95. The 2002 Whitaker decision and its two predecessors were rendered on short notice on the eve of, and during, an ongoing strike. Perhaps because of those exacting time constraints or other considerations, the July 4, 2002 decision was issued without reasons.

96. In my opinion the Whitaker decision is relevant but by no means dispositive. The terms of an expired EASA may well be instructive. However, I am not prepared to find that an expired EASA establishes a presumptive baseline under this Act. The previous EASA has been lawfully terminated pursuant to section 8. Either party is entitled to request that the Board take a fresh look at the facts as they appear to present at the time of a renewal. The Board has an independent responsibility to reach its own conclusions should the parties fail to agree.

97. In this case, the terms of the expired EASA were established nearly ten years ago, albeit renewed in 2009. A lot has happened in the City of Toronto since 2002. Nor do I discount

the City's position that it had filed an application to amend that EASA prior to the end of the 2009 strike.

The Statutory Definition

98. Subsection 1(1) of the Act provides what may be read as a virtually open-ended definition of "essential ambulance services". The City in essence rests its case upon such an interpretation. The City asks the Board to declare that all of its paramedics are required to provide essential ambulance services. It does so because it says that all of its ambulance services are "essential".

99. The difficulty with this submission is that the same services identified by the City of Toronto as "essential" are required all over the province. If *all* of the ambulance services provided by the City are indeed "essential" within the meaning of the Act, then none of its ambulance workers may strike or be locked out. There would be no need for a more narrowly focussed EASA for the City or any other employer of paramedics in the province.

100. On this point I accept the more limited interpretive approach urged by Local 416. In my opinion the definition must be construed having regard to the purpose of the statute as a whole. The expansive reading proposed by the City would effectively render the Act entirely redundant. The policy balance underpinning the Act would be frustrated.

101. In fact, the Act specifically contemplates that paramedics, in large composite bargaining units such as represented by Local 416, be exposed to a collective bargaining regimen. They may strike and they may be locked out. In this case the City has as much legal right to contemplate a possible lock-out in 2012 as the Union did to call strikes in 2002 and 2009.

102. If the purpose and scheme of the Act are to be respected, 'business as usual' may not be the presumptive endpoint of any analysis. The Act itself requires the Board to consider a distinction between 'business as usual' ambulance services and those ambulance services which are genuinely "essential" within the meaning of the Act.

103. In *The Crown in Right of Ontario (Represented by Management Board of Cabinet)* [2002] OLRB Rep. March/April 17 at page 172, the Board made the following observations concerning the parallel provisions in *CECBA*:

13. *CECBA* does not require that essential services be provided during a strike or lockout in order to prevent serious and real hardship and privation generally. The parties in the *ESA* explicitly acknowledge that the provision of essential services is not "business as usual". Certainly, there may be a point where serious and real hardship and privation renders the employer unable to prevent danger to life, health or safety.

104. Implicit in the very structure of the Act is the presumptive policy judgment that not all ambulance services are "essential". To put it another way, there is no presumption that 'business as usual ambulance services' means the same thing as "essential ambulance services". Absent exceptional circumstances, the Act suggests that the latter is a subset of the former; they are not presumptively synonymous. As the Act is written, it is almost inevitable that the public will be affected in the event of a lock-out or strike.

The Adjudicative Challenge

105. How then should the Board approach this problem?

106. I am acutely aware that reasonable people may well differ with respect to where lines should be drawn. There is certainly no single correct answer to the question posed by this application. However expert the Board may be with respect to labour relations matters, the Board claims no special insight with respect to the question of what should be an appropriate standard for ambulance services in normal circumstances.

107. The parties and the Board have no difficulty in seeing that critical Echo and Delta calls are "essential ambulance services" on any application of the definition. There is little doubt that Charlie calls are also essential, in my opinion. But it gets increasingly more difficult after that point. This is not an easy task at the margins. A citizen waiting for an ambulance is not thinking about whether or not he or she is an Alpha or an Echo call, or, is at any so-called margin wherever that margin may be.

108. Former Chair Judith McCormack had this to say in *The Crown in Right of Ontario Represented by Management Board of Cabinet* [1995] OLRB Rep. June 735 at page 740 in connection with the first essential services case arising under new *CECBA* provisions:

...

15. Balancing the opposing elements of this scheme is a delicate and challenging proposition. We anticipate as well that each specific situation brought before the Board will carry with it many of these conflicting tensions in microcosm.

16. Often, however, there is a quality of rough justice to adjudication in this area. Much of what adjudicators need to make sound decisions is either so detailed as to be unworkable in a case of this scale, or unknowable, at least in the absence of any previous strike or lockout history. If we are to be candid about adjudication in this area, at least at this point, we must admit that our decisions will be approximate in a forum in which we would prefer prescience.

109. In my opinion the Board must take the standards for ambulance services as the Board finds them. The Board has no emergency health care expertise. Nor has the Board any jurisdiction to pronounce, for example, that any particular response time target must be met no matter what. Such targets are frequently unmet whether or not a strike or lock-out is in progress. Nevertheless, the Board does have statutory responsibility to determine the number of ambulance workers required to provide essential ambulance services. In my opinion, this determination should not be made in the abstract. Rather, it must be made using existing standards, the pre-application context, as a guidepost. It may also take into account whether or not existing standards are normally met.

Paradoxical Submissions

110. The arguments in this case were presented by experienced counsel whose vigour in the representation of their clients was matched by their skill. The Board was the fortunate beneficiary of focussed submissions which made it clear that there were no material differences between the parties with respect to the essential facts. Counsel however emphasized the relative significance of different facts and urged that the Board adopt quite different conclusions.

111. What was never in doubt was the respect by both parties for the paramedics who are members of the Union and employed by the City. Nor has there ever been any doubt as to the dedication of the paramedics themselves to their profession and the work which they do. In this regard, counsel for the City was careful to make his client's position clear.

112. Although in this application the Union submits that far less than the normal complement is sufficient to deliver “essential ambulance services”, the evidentiary record discloses that Local 416 has for years attempted to convince the employer that more, not fewer, paramedics are required to meet appropriate standards. Local 416 decries the normal paramedic complement as grossly inadequate. Ironically, the City relies upon this position in support of its case.

113. Local 416’s public support for a substantial increase in the ongoing paramedic complement surely does no harm to the City’s case that little or no reduction in services should be permitted during a labour disruption.

114. On the other hand, although the City advises the Board that current performance standards are not being met and that all of its paramedics are required, there is no dispute that there has been a virtual freeze on hiring for many years with a reduction in paramedic complement contemplated in 2012 Budget documents.

115. The 2012 Budget documents demonstrate that the City is prepared to consider further degradation of ambulance service performance below target standards which have not been met for some time. When the employer simultaneously advises the Board that no compromise from a 100% ambulance worker complement is tolerable, Local 416 points to the apparent contradiction.

116. Both parties’ public positions are somewhat revealing. In the result I have concluded that the best balance is to be found somewhere between the parties’ respective EASA litigation positions.

Relevant Facts

117. I do not propose to re-state the submissions of the parties recorded above in précis form which contain many undisputed facts. Nor does this decision record all of the documents provided to the Board which have been reviewed with care. Some of the material however was particularly informative from my perspective.

118. There has been a significant shift in ambulance services provided by the City since 2002. It is undisputed that what the City refers to as non-emergency calls comprise only 4.4% of total call volume now — as opposed to approximately 22% in 2001. Such calls consist primarily of non-emergency transfers of patients.

119. Accordingly, there is far less ‘flex’ in the system in 2012 than there was in 2002 when the Whitaker decision issued and when the Board found that a 25% reduction in complement was appropriate. This is a significant change in circumstance.

120. Having said that, the statistics relied upon by Local 416 relating to the 2009 strike, and equivalent periods, are also interesting. In the passage quoted above, former Chair McCormack noted that the Board will not always have any strike or lock-out history to consider when formulating an EASA. That is not the case here. We do have statistical information which permits some assessment at least of the impact of the prior Whitaker EASA in real time. What do those statistics show?

121. The median and 90th percentile response times for Echo, Delta, Charlie, and Bravo calls did not appreciably vary during the lengthy 2009 strike period from times achieved during the identical non-strike periods in 2008, 2010, and 2011. These response times were achieved in 2009 by a paramedic complement unchanged from the 2002 Whitaker decision —

notwithstanding a significant increase in overall call volumes and the shift away from what the City describes as non-emergency calls.

122. This leaves the remainder of the calls.

123. The Board was provided with an extensive list of typical Alpha calls. The most numerous group of Alpha calls bear the code 26A01 described as "sick person, no priority symptoms (complaint conditions 2-11 not identified)". Alpha 1-3 calls are less numerous. They involve responses, typically to nursing homes, concerning patients with no priority symptoms. This is certainly not to say that patients in Alpha 1-3 categories may be left without paramedics indefinitely.

124. The target response times for Alpha calls (set out in paragraph 45 above) stated in minutes are as follows: Alpha (20:59); Alpha 1 (30:00); Alpha 2 (60:00); Alpha 3 (120:00). Scheduled transfers, by definition, are calls which are scheduled without a target response time. Target response times in Alpha cases therefore range from 30 minutes to 2 hours. This is not to say that those target times are always met.

125. Data from the 2009 strike period demonstrates that there was a significant fall-off from normal target response times for the Alpha categories. One assumes that this was the inevitable result of the EASA reduction in available ambulance workers who were deployed to more urgent calls.

126. I found the statistics which identified the breakdown of call volume between the various 'emergency' categories to be of interest. As of 2011, as set out in Appendix 2 to this decision, they were as follows in percentage terms: Echo (1.8%); Delta (33.3%); Charlie (13.1%); Bravo (27.1%); Alpha (15.8%); Alpha 1 (1.3%); Alpha 2 (0.5%); Alpha 3 (0.1%); Code 2 Emergency (1.8%).

127. There is also no question that there has been a significant shift from 2002 until 2011 in the proportion of emergency and non-emergency calls as noted above. It is the case however that this shift occurred at some point before the 2009 EASA was reached by the parties. In 2009 non-emergency calls comprised 6.1% of overall call volume.

128. It is also noteworthy that the City has been prepared to live with an increase of a mere 1% in paramedic complement notwithstanding all of the significant changes recited above. The 2012 Budget documents indicate a willingness to consider a further reduction of 36 positions from a total paramedic complement of 870, a reduction of just over 3%.

Conclusions

129. As previously indicated, there is no single 'right' answer in cases such as these. If your family believes it needs an ambulance, it wants an ambulance now. Your family does not concern itself with the question of whether or not its call for an ambulance is "essential" within the meaning of the Act.

130. On the other hand, it is not possible to position ambulances in every neighbourhood all of the time. What is considered 'essential' outside of a labour disruption is also a matter of opinion. Judgments are made within economic parameters. Those economic parameters are subject to political debate, and set, one would hope, on the basis of expert advice.

131. What does appear on the material before the Board is that targets for compliance with established response time standards are not being met in the City of Toronto in many cases. The Board has no capacity, nor the jurisdiction, to assess whether or not those standards are reasonable or whether they are achievable. It does however mean that the Board should approach so-called standards and statistical information with considerable care. Performance short of a desirable standard may be accepted or, at least, tolerated in practice.

132. In this case, it appears beyond question that the management and professional staff of the City's EMS have done a remarkable job over the last ten years with far fewer resources than were available in the past. It is extraordinary that the paramedic complement has grown by only about 1% over that period given the increase in the City's population, the increase in overall call volumes, and the significant change in the mix of emergency and non-emergency services which has taken place.

133. The July 4, 2002 Whitaker decision was rendered without reasons while the 2002 strike was in progress. It is therefore not possible to determine whether or not the 25% reduction in paramedic complement was directed having particular regard to the fact that approximately 22% of the call volume in 2001 was attributable to what the City refers to as non-emergency cases.

134. Nevertheless those statistics are revealing. They point, as Mr. Saunders submits, to a possible direction for paramedic numbers for a 2012 EASA if the City's primary position is rejected. The City states that the Board should order no more than a 4.4% decrease in complement to match the current percentage of non-emergency cases.

135. On the other hand, Local 416 fairly observes that the 2009 strike statistics demonstrate that the Whitaker EASA worked exactly as the Act contemplates, indeed arguably better. All categories of calls other than Alpha were answered during the 2009 with little less alacrity, and even more in some cases, than during equivalent non-strike periods. These statistics point, Mr. Goldblatt submits, to increasing the Whitaker numbers by some reasonable percentage corresponding with increases in call volumes, he says by 5% or 8% at most.

136. On balance, having considered the competing positions and the purpose of the Act, I have determined that there should be an increase in the number of ambulance workers required to continue working during any strike or lock-out beyond the number settled by former Chair Whitaker in 2002 and carried forward into the 2009 EASA. I am not prepared to find that the City is locked in, as a practical matter, to the 2009 EASA. On the other hand, I am not prepared to find that the Act permits the Board to reach the conclusion that the City's ambulance services should continue on a 'business as usual' basis in the event of a lock-out or strike.

137. I have relied in particular upon the following considerations and/or conclusions:

- call volumes have increased since 2002
- the call 'mix' has changed substantially since 2002
- 2009 strike period data appears to demonstrate that the 2009 EASA worked adequately, indeed more than adequately in many cases
- 'non-emergency' transfer calls are not "essential ambulance services" within the meaning of the Act nor are, at least, a very significant percentage of Alpha calls
- response time targets are frequently unrealized objectives

- the paramedic complement has been increased by only 1% by the City since 2002
- the City is considering a further 3% decrease in numbers of paramedics for 2012

138. The City seeks an order that 100% of its 319 paramedics work on weekdays in the event of a lock-out or strike. At most it acknowledges that an approximate figure of 95% i.e. 305 paramedics might be acceptable should non-emergency calls be removed from any analysis.

139. Local 416 is prepared to entertain at most up to an 8% increase from the Whitaker EASA i.e. to 251 paramedics on the basis that such an increase would be reflective of the increase in call volumes in the Echo—Bravo categories since 2009. Such an increase would amount to a number approaching 80% of the current paramedic complement.

140. Having regard to the requirements of the Act, and the foregoing review of the relevant materials provided by the parties, I have decided that a reasonable number would be that which would permit the City to keep approximately 85% of its paramedic complement at work on weekends and weekdays. Those numbers are 272 paramedics for weekdays and 233 paramedics for weekends. It might be observed that the Echo, Delta, Charlie and Bravo categories represent 75.3% of the total 2011 EMS call volume.

141. The parties have agreed that the Board should remain seized with respect to all other issues concerning the EASA which is required by the parties. The Board will be available to hear any submissions in this regard in a continuing consultation format on short notice and outside of normal business hours if necessary.

142. Subsections 9(5) and 10(3) of the Act provide the Board with broad discretion to consider amendments or modifications to any provision of an EASA including the number of ambulance workers required to provide essential ambulance services. The Board would be receptive to suggestions from the parties as to the best way of establishing expedited access to the Board if such circumstances were to arise.

“James Hayes”
for the Board