

# Essential Service Review

Meeting Date: August 27, 2008

Subject: Essential Service Review

## **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