

In the matter of the Canada Labour Code (Part I – Industrial Relations)
and a referral by the Minister of Labour to the Canada Industrial Relations Board
pursuant to section 87.4(7) involving the City of Ottawa (OC Transpo) and the
Amalgamated Transit Union, Local 279



SUBMISSIONS OF
THE AMALGAMATED TRANSIT UNION, CANADIAN COUNCIL

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INTRODUCTION

These are the submissions of the Amalgamated Transit Union Canadian Council (“ATU CC”) in response to the Canadian Industrial Relations Board request for submissions in the matter of a referral by the Minister of Labour pursuant to section 87.4(7) of the *Canada Labour Code*.

Specifically, the Board has invited the parties and the general public to provide a written explanation as to why they think the obligation under s.87.4(7) of the Code is or is not being met during the current work stoppage involving the City of Ottawa (OC Transpo) and the Amalgamated Transit Union, Local 279.

The Amalgamated Transit Union, Canadian Council believes this is an important issue, raising significant public policy concerns, not the least of which is the potential to interfere with the system of free and fair collective bargaining, the lynchpin of the *Canada Labour Code* and a constitutionally guaranteed right and freedom.

The Amalgamated Transit Union & the Canadian Council

Founded in 1892, the Amalgamated Transit Union is the largest labour union for transit workers in North America. Today the union has over 180,000 members in over 273 local unions in forty-six (46) states and nine (9) provinces. The ATU membership includes bus, subway, light rail and ferry operators, clerks, baggage handlers, mechanics and others in public transit, inter-city and school bus industries.

Established in 1982, the Canadian Council is the highest authority and voice in Canada for the ATU on all issues of Canadian interest, including legislation, political, educational, health and safety, cultural and social welfare matters.

SUBMISSIONS OF THE AMALGAMATED TRANSIT UNION, CANADIAN COUNCIL

The Call for Submissions

On or about December 30, 2008, the Canada Industrial Relations Board issued the following Notice to the Public, by publishing such on its web page and via paid advertisements in both French and English major newspapers:

Notice To The Public:

In the matter of the Canadian Labour Code (Part I – Industrial Relations) and a referral by the Minister of Labour to the Canada Industrial Relations Board pursuant to section 87.4(7) involving the City of Ottawa (OC Transpo) and the Amalgamated Transit Union, Local 279.

The Minister of Labour, the Honourable Rona Ambrose, has requested that the Canada Industrial Relations Board determine the action, if any, that is required in order for the employer, the union and the employees in the bargaining unit to comply with section 87.4(1) during a work stoppage.

Section 87.4(1) of the *Canada Labour Code* provides that: “During a strike or lockout not prohibited by this Part, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods **to the extent necessary to prevent an immediate and serious danger to the safety or health of the public.**”

Keeping this criterion in mind, members of the public have an opportunity to provide a written explanation as to why they think this obligation is or is not being met during the current work stoppage involving the City of Ottawa (OC Transpo) and the Amalgamated Transit Union, Local 279.

Submissions must provide specific details in support of the statements being made and must be limited to the issue raised in this notice. They must also include the name and contact information of the person making the submission. Please note that all submissions received will be transmitted to the employer and the trade union for their review and comment.

Issues:

- 1.
- 2.
- 3.

Background

The Amalgamated Transit Union, Local 279 (hereinafter “the Union”) holds exclusive bargaining rights for the employees of OC Transpo (hereinafter “the Employer”). The Union has been engaged in a lawful strike pursuant to the *Canada Labour Code* since ??? and has conducted itself in an exemplary manner, consistent with its obligations under the *Code*.

By contrast, the Employer has engaged in bad faith bargaining and conduct contrary to its obligations under the *Code*.

In an unprecedented move, the Minister, at the request of the Employer, ordered a vote, pursuant to s. ? of the *Code* forcing a vote on the Employer’s most recent offer, notwithstanding the Union’s strenuous objection to such, and notwithstanding that the offer did not represent a marked difference from the earlier offer which had been resoundingly rejected by the membership. This unprecedented interference with the lawful strike in the circumstances was concerning.

At or around the same time, the Minister, without any request from either of the parties to the dispute and with no apparent foundation, referred a request to the Canada Industrial Relations Board (hereinafter “the Board”) pursuant to s.87.4(7) of the *Code* “to determine the action, if any, that is required in order for the employer, the union and the employees in the bargaining unit to comply with section 87.4(1)”.

The Board then, in a further unprecedented move, placed ads in both French and English major newspapers, seeking public input on this referred question.

Further, it should be noted that the Board served notice to and directed the parties to the dispute to file their respective submissions on the referral question at the same time as the public, thereby ignoring the legal burden of proof and adversely affecting the due process rights of the parties in this matter.

Process Concerns

At the outset, we would note our concern with the process which has been adopted in the handling of this matter. We believe that the initiative to invite public submissions on an issue of collective bargaining under Part I of the *Canada Labour Code* is unprecedented, unwarranted and inappropriate.

The fundamental purpose of Part I of the Code is to establish a system of free and fair collective bargaining for industrial parties subject to federal jurisdiction. This right has been recognized as fundamental. In fact, this right has been declared and recognized as a basic human right by the international labour community, by Canada (as signatory to international conventions with respect to such), by the Supreme Court of Canada and by this and other Boards across Canada.

Public transit in Ottawa has not been declared an essential service. In fact, there is a longstanding agreement between the parties to this dispute (i.e the Union and Employer) that transit services NOT be treated as an essential service. There are specific established tests to determine whether an operation ought to be declared an ‘essential service’ within the meaning of a given legislative provision or within the meaning of long established jurisprudence on the issue. The provision of public transit in Ottawa does not meet any of the established tests which would warrant consideration of these services as ‘essential’. (This issue will be addressed in greater detail under the heading “Essential Services” below.) At this stage, suffice it to say that any attempt to effectively seek to treat and/or find these services as ‘essential’ through other than the traditional means ought to be undertaken only with the utmost caution.

The ATU CC submits that the referral in this matter effectively constitutes a means of attempting to make an ‘essential service’ designation or finding via the back door. Accordingly, the Board ought to undertake such referral with great caution, and with a concerted effort to ensure that fundamental rights and constitutionally guaranteed

freedoms are not overlooked, minimized, trumped or otherwise interfered with through the process.

With respect, it is the position of the Amalgamated Transit Union, Canadian Council that the Board's call for public submissions on this issue is ill-advised and constitutes a dangerous precedent which cannot be condoned.

The burden of proof in alleging that services are essential or that circumstances constitute an emergency lies upon the party so alleging. The jurisprudence is clear that the burden of proof that services are essential cannot be met by speculation or speculative claims.

It is questionable on what basis the Minister could/would submit a referral on a question of whether "an immediate and serious danger to the safety or health of the public" exists, absent a serious and well founded complaint with respect to such. In other words, it is unclear on what basis the Minister could/would purport to **initiate** such a claim. This is particularly so where neither of the legally recognized parties to the dispute have raised any such concern. This is particularly so where the question of 'danger to the safety or health of the public' is well recognized as one of the established tests for determining essentiality of a service, yet there has been no move to seek to declare transit service in Ottawa an 'essential service' through the traditionally recognized legal means.

With respect, to allow such an important question to be considered in this manner, without the traditional safeguards is a dangerous precedent which ought not to be entertained. At a minimum, it is necessary that the Board fully consider and ensure that the question is considered with full regard to the strict, narrow test to be met, the legal burden and assurance that full due process is afforded. (This issue will be dealt with further under the heading "Danger to Life, Health and Safety".)

The problem is compounded with the Board's invitation to the public for submissions. Again, it is unprecedented that the Minister or Board would **initiate** and actively seek and solicit 'evidence' and arguments which had not been raised by any party with legal

standing, nor by any purportedly affected party. Again, such an approach constitutes a dangerous and ill-advised precedent, not to mention the appearance of bias when the neutral body charged with determining these important questions of law sees fit to initiate and undertake its own public inquiry with the potential impact of undermining fundamental collective bargaining rights and freedoms.

Concerns of due process further arise when the actual parties to the dispute are directed to file their respective submissions on the question in advance of any legal burden of proof being met or even raised yet that services are essential and/or that 'serious danger to the safety of health of the public is imminent'. Such a process arguably constitutes a serious error and denial of due process.

Freedom of Association

As noted above, the fundamental purpose of Part I of the Code is to establish a system of free and fair collective bargaining for industrial parties subject to federal jurisdiction. The critical role of organized labour and collective bargaining has long been recognized. In fact, freedom of association, including the right to engage freely and fully in collective bargaining, has been recognized as a fundamental human right both nationally and internationally.

The Supreme Court of Canada recognized the international acceptance of collective bargaining as a basic and fundamental human right in *Dunmore v Ontario* (2001, SCC 94). Therein he concluded for the majority of the Court at paragraph 67 that:

“at a minimum the statutory freedom to organize ...ought to be extended...along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.”

More recently, in *Health Services and Support v British Columbia*, [2007] 2 S.C.R. 391, the Supreme Court of Canada expressly overturned the prior trilogy of cases dealing with the issue of collective bargaining, finding that:

“Freedom of association guaranteed by s.2(d) of the *Charter* includes a procedural right to collective bargaining. The grounds advanced in the earlier decisions of this Court for the exclusion of collective bargaining from the s. 2(d)’s protection do not withstand principled scrutiny and should be rejected. The general purpose of the *Charter* guarantees and the broad language of s.2(d) are consistent with a measure of protection for collective bargaining. Further, the right to collective bargaining in Canada reveals that **long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society**, emerging as the most significant collective activity through which freedom of association is expressed in the labour context. **Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter***. The protection enshrined in s.2(d) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining. **Canada’s**

adherence to international documents recognizing a right to collective bargaining also supports recognition of that right in s.2(d). The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified. Lastly, the protection of collective bargaining under s.2(d) is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*

The constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. Section 2(d) of the Charter does not guarantee the particular objectives sought through this associational activity but rather the process through which those goals are pursued. It means that employees have the right to unite, to present demands to government employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining. However, s. 2(d) does not protect all aspects of the associational activity of collective bargaining. It protects only against “substantial interference” with associational activity. **Intent to interfere with the associational right of collective bargaining is not essential to establish breach of s.2(d). It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining.**” (emphasis added)

In light of the holdings of the Supreme Court of Canada, and in particular its finding that the Charter ought to be presumed to provide at least a level consistent with the rights acknowledged in international conventions to which Canada is signatory, section 87.4 must be interpreted and applied narrowly by the Board so as to ensure, to the greatest extent possible, that the rights of the Union to continue its ongoing lawful strike are not interfered with. In fact, any such interference would constitute a violation of the *Charter* pursuant to the Supreme Court of Canada findings.

Essential Services

As noted above, it is the position of the ATU CC that the referral in this matter effectively constitutes a back door attempt to declare/treat the parties to this dispute as an “essential service”. Accordingly, it is necessary to examine the issue of ‘essential service’ to ensure that the matter is given appropriate consideration, and that the appropriate tests and burden are considered.

It is well established that three basic models of legislation dealing with strikes and essential services exist. Specifically,:

1. the unfettered strike model
2. the no strike model
3. the designation or controlled strike or essential services model

As noted by Hadwen et al in their text, *Ontario Public Service Employment & Labour Law* (2005) at p. 453, “**the burden of proof that services are essential or that circumstances constitute an emergency lies upon the party so alleging**”. It is further noted therein that “**the burden of proof that services are essential is not met by speculation**”. (emphasis added)

A legislative review re ‘essential services’ legislation across Canada makes it clear that the vast majority of legislative models defining “essential services” include “to prevent danger to life, health or safety” as a factor.

As noted in *Ontario Public Service*:

“The leading case on what constitutes “danger to life health and safety” concerned the Wolfe Island Ferry, which is the provincially-operated transportation link between Wolfe Island and the city of Kingston. The OLRB accepted that the reduction in ferry service had caused “considerable grief and hardship.” However, the reduction was left in place because there was no proof of danger to life, health or safety.”

The Ontario Labour Relations Board noted in *MBC v OPSEU* that “**even ‘serious and real hardship’ will be insufficient justification for the provision of essential services, unless it endangers life, health or safety.**” [2002] OLRB Rep. March/April 170 (Whitaker) (emphasis added)

Transit services are NOT mentioned as an essential service in any statute across Canada dealing with essential services. Therefore, the ATU CC recommends that the Board exercise caution in approaching the question via s. 87.4(1)

Further, not only are transit services not listed as ‘essential services’ in any of the legislative provisions setting out such, it should be noted that the unfettered strike model applies throughout the municipal and public transit sectors in Ontario. Likewise, there was consensus among labour and management representatives that transit was not an essential service in western municipalities including Saskatchewan, Alberta and British Columbia.

In fact, as noted by Adell et al, in their text *Strikes in Essential Services*, (2001) IRC Press:

“With the important exceptions of Toronto and Montreal, mass public transit is not an essential service. Those two cities aside, unions and management almost invariably shared the view that transit systems could safely be shut down completely in the event of a work stoppage and that the unfettered strike model was therefore appropriate. Even in Vancouver, the third-largest city in Canada, full transit strikes were tolerated for several months in 1984 and again in 2001 ...

On the basis of the evidence before us, we would have to conclude that the unfettered strike model is appropriate for public mass transit everywhere in Canada except Montreal and Toronto.”

It should be noted, that even though Adell et al suggest that Toronto may be an exception to the general rule that mass public transit is NOT an essential service, even in Toronto, when the question was recently put to City Council, Toronto City Council, specifically decided that the TTC (public transit) should NOT be declared an essential service. In its internal and commissioned report on the issue it was determined that “we believe that the

TTC, the City and its residents would be best served by not declaring TTC as an essential service.”

It is also to be noted that both the union and employer in Toronto agreed that transit services were not an essential service.

Perhaps more importantly, however, it has been the longstanding agreement between the parties in this dispute (i.e. the Amalgamated Transit Union, Local 279 and the employer, OC Transpo) that the provision of mass public transit NOT be considered an essential service. In fact, when an Ottawa city councilor attempted to seek a declaration that public transit be declared an essential service, the City of Ottawa, like the City of Toronto, determined that it was not in the best interests of the City or its residents to declare transit an essential service. Accordingly, the motion was defeated.

It should also be noted that para transit services are NOT affected by the current labour dispute. In any event, even when para transit services engaged in a strike in 2001, they were not declared an essential service.

Accordingly, in the case at hand, the Board should interpret and apply s.87.4 narrowly to ensure that, at a minimum, its analysis in this referral is at least as stringent as the test applied by Board’s across Canada in determining whether an ‘essential service’ is founded. The Board should not entertain a finding that any action is required in order “to comply with section 87.4(1)” unless the Board is satisfied that the burden of proof has been met on a sustainable objective standard, that the strict test re imminent danger to life, health and safety has been met.

As noted above, the Board ought to engage in this analysis in the context of ensuring that the Union’s constitutional fundamental rights to engage in lawful strike activity are safeguarded and in no way interfered with.