



In the Matter of the City of Toronto's Request to Designate the Toronto Transit Commission an Essential Service

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 City of Toronto’s request that the provincial government designate the Toronto Transit Commission an essential service.

The government has indicated that it will consult with the affected parties, prior to making its decision on this matter.

The ATU CC believes this is an important issue, raising significant public policy concerns, namely, the potential to interfere with the system of free and fair collective bargaining, the lynchpin of the *Ontario Labour Relations Act* (the “Act”) 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.

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Background

The Amalgamated Transit Union, Local 113 (the “Union”) holds exclusive bargaining rights for the operations and maintenance employees of the Toronto Transit Commission (the “Employer”). The Union and the Employer are bound by a collective agreement and currently, there are no labour relations issues between them that are in any way, out of the ordinary.

In an unprecedented move, the Toronto City Council voted to request the provincial government designate the Employer an essential service. This unprecedented interference with the collective bargaining relationship between the parties is concerning.

Under labour law, essential services are those that society cannot do without, even momentarily, because of the potential for loss of life or limb. Those that are truly essential—such as health, fire and police services—must be available 24 hours a day, 7 days a week, 365 days a year. Clearly public transit is not in the same category as hospitals, fire halls, and police stations.

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 City of Toronto’s request for an essential services designation through the provincial government is improper.

The fundamental purpose of the Act is to establish a system of free and fair collective bargaining for industrial parties subject to provincial jurisdiction. In Canada, this right has been recognized as fundamental. In fact, this right has been declared and recognized as a basic human right by the Supreme Court of Canada, by the Ontario Labour Relations

Board (the “Board”) and other labour boards across Canada, by the international labour community and by Canada (as signatory to international conventions with respect to such).

Public transit in Toronto has not to date, been declared 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 Toronto 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 not to be undertaken.

The ATU CC submits that the City of Toronto’s request in this matter effectively constitutes a means of attempting to make an essential service designation or finding via the back door. The normal process would be for an employer to apply to the Board for a declaration of essential services. The City of Toronto clearly knows this is the appropriate process. However, the Employer has not made such an application, arguably because it is so clear on the test for essential services, it would not be successful in such an application. The City of Toronto is fully aware that the Employer would not succeed in having the Board declare public transit essential. Therefore, for political purposes only, it has requested the provincial government create legislation or a legislative amendment declaring the Employer an essential service. This is a transparent attempt to bypass the current legislation and longstanding jurisprudence on this issue.

Accordingly, the provincial government ought to consider such request 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.

The ATU CC submits that imposing legislation sidesteps the established process and violates the principles of natural justice. 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.

Neither of the legally recognized parties to the collective agreement has raised any concern about a threat to the safety or health of the public. 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 Toronto an essential service through the traditionally recognized legal means, namely at the Board.

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 matter be put before the Board, to 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”.)

Concerns of due process further arise when the actual parties to the dispute are forced to make their respective submissions on the question in advance of any legal burden of proof being met (or even raised) that services are essential and/or that ‘serious danger to the safety of health of the public is imminent’. Such a process constitutes a denial of due process.

Freedom of Association

As noted above, the fundamental purpose of the Act is to establish a system of free and fair collective bargaining for industrial parties subject to provincial 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 Justice Bastarache 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, the provincial government should refuse to interfere with the Union’s fundamental right to collective action. In fact, any such interference would constitute a violation of the Charter pursuant to the Supreme Court of Canada findings and would open the provincial government to a constitutional challenge.

Essential Services

As noted above, it is the position of the ATU CC that the request in this matter effectively constitutes an attempt to circumvent the Board and to declare transit in Toronto 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)

Danger to Life, Health and Safety

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 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)

Likewise, the Public Service Staff Relations Board ruled out certain considerations as material in determining whether employees were to be designated in the *Radio Operations Case*, (1979) wherein it held:

“We have no hesitation in saying that duties, the performance of which are necessary in the interest of the safety or security of the public, do not encompass such duties as would serve only to permit the Employer to carry on business as usual; nor do they encompass such duties as would serve only to protect the Employer or the public from economic hardship; nor do they encompass such duties as would serve only to prevent inconvenience to the public.”

Further, the PSSRB held in another case that “to encompass .. within the words ‘safety or security’, the mental, psychological or emotional state of individuals strains the ordinary meaning of those words.”

The Canada Industrial Relations Board, in considering the relevant provision of the Canada Labour Code, held in *Canadian National Railway Company* [2005] CIRB No. 314 at para 27:

“Section 87.4 is directed specifically towards the prevention of an immediate and serious danger to the safety or health of the public. The section does not give the Board any jurisdiction to deal with other matters in the public’s interest that might be impacted by a labour dispute. For example, the issue as to whether a work stoppage might result in economic hardship to the national economy does not fall within the Board’s mandate.”

Accordingly, the jurisprudence is clear that issues such as public inconvenience, economic hardship or traffic disruptions are not relevant to the determination of whether an employer is an “essential service”. As noted above, lack of public transit has not been held to meet the test for a declaration as an essential service in any Canadian jurisdiction outside of the city of Montreal. This is the case notwithstanding a history of some extensive strikes in this sector including, but not limited to a nine month long transit strike in Quebec city, a one hundred and twenty nine (129) day public transit strike in

Vancouver (Canada's third largest city), a fifty (50) day strike in Calgary, and a six week strike Winnipeg.

It is impossible to consider the legal test of whether “immediate and serious danger to the safety or health of the public” exists in a vacuum. There have been no complaints raised or put forward to address with respect to such. We would again note that the burden of proof to allege such lies with the party making the assertions. Any such ‘evidence’ would need to be subject to challenge in the normal course, through the opportunity for full cross examination if necessary. Only after at least a prima facie case has been made out suggesting the existence of imminent and serious danger to the public should the Union be required to address the issue.

Transit services are NOT mentioned as an essential service in statutes across Canada dealing with essential services, with only the city of Montreal ever having any level of conventional transit services recognized as essential, and only in limited capacity and circumstances. In fact, in British Columbia, the then Finance Minister understood this point. In 2001, he was asked why the government would not declare transit an essential service and end the months-long strike that had hurt downtown businesses and grounded hundreds of thousands of Lower Mainland citizens. Minister Collins stated:

It's not life or limb. It's different from health care. I know the Minister of Labour is keeping a very close watch on this...and there is still room to get a negotiated agreement. We're very mindful of the impact it's having on a lot of people, but that's the way the process works. It is an inconvenience—it's a huge inconvenience to some people—but it's not life or limb”

The ATU CC recommends that the Ontario provincial government exercise the same caution in approaching the question of transit as an essential service via legislation.

Further, not only are transit services not listed as essential services in 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.

Accordingly, in the case at hand, the provincial government should deliberate carefully to ensure that, at a minimum, the analysis of this request is at least as stringent as the test applied by labour boards across Canada in determining whether an 'essential service' is founded. Unless the provincial government 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, it should not acquiesce to the City of Toronto's request.

As noted above, the provincial government 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. The best way to ensure such, is to refer this matter to the Board and allow it to make a determination in the ordinary course.

CONCLUSION

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

The ATU CC strongly urges the provincial government to ensure that in advance of considering creating any essential services legislation pursuant to the City of Toronto's request, it must be convinced by clear, cogent, compelling arguments that demonstrate imminent risk to public safety or health.

Issues of economic hardship, traffic disruptions and/or public inconvenience, even serious and real hardship, will be insufficient justification, and accepting such arguments would lead to a violation of the employees' fundamental human rights.

Public transit has not been recognized historically as an essential service. In fact, the provision of public transit in Toronto does not meet any of the established tests which would warrant consideration of these services as 'essential'.

The provincial government ought to undertake consideration of the City of Toronto's request with great caution, and with a concerted effort to ensure that fundamental rights and constitutionally guaranteed freedoms are not minimized or otherwise interfered with through the process.

As the Canadian voice for the Amalgamated Transit Union, we would appreciate the opportunity to make further submissions on such as necessary.

Thank you for your consideration.