IN THE MATTER OF AN ARBITRATION

BETWEEN:

TORONTO TRANSIT COMMISSION

("the Employer")

AND:

AMALGAMATED TRANSIT UNION, LOCAL 113

("the Union")

IN THE MATTER OF:

RENEWAL COLLECTIVE AGREEMENT

ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE EMPLOYER:

Dolores Barbini	- Counsel
Jonathan Maier	- Counsel
Gemma Premontese	- Head Human Resources
Scott Blakey	- General Manager, Employee & Development
Lindsay Young	- Employee Relations Consultant
Dave Dixon	- Chief Operating Officer
And others	

APPEARANCES FOR THE UNION:

Ian Fellows	- Counsel
Dean Ardron	- Counsel
Bob Kinnear	- President/Business Agent
Manny Sforza	- Executive Vice-President
Rocco Signorile	- Secretary-Treasurer
Frank Grimaldi	- Assistant Business Agent – Transportation
Scott Gordon	- Assistant Business Agent – Maintenance
And others	

I have been appointed under the Toronto Transit Commission Labour Disputes Resolution Act, 2011 to adjudicate upon the issues that remain in dispute between the parties in respect of the negotiation of a renewal collective agreement to the collective agreement between them that expired March 31, 2011. There is no dispute with respect to my authority in this regard.

A hearing in this matter was convened on May 5, 2012. The parties tendered written briefs and documentation in advance and then made oral submissions at the hearing. The submissions and supporting documentation have been fully considered.

This is the first set of negotiations subsequent to the enactment of the Toronto Transit Commission Labour Disputes Resolution Act, 2011. On December 14, 2010, the City of Toronto requested that the Province declare public transit in Toronto an essential service. The Union (Local 113, ATU) requested that the TTC not be declared a public service. The Ontario Minister of Labour introduced legislation designating the TTC as an essential service, thereby removing the right to strike/lockout and requiring that collective bargaining disputes be referred to interest arbitration. The Act received Royal Assent on March 30, 2011. Pursuant to Sections 1 and 15 of the Act, the prohibition on otherwise legal strike/lockout activities covers all employees at all of the TTC's operations. Subsection 10(1) of the Act empowers an arbitrator appointed under this legislation to "examine into and decide on matters that are in dispute and any other matters that appear to him or her necessary to be decided in order to conclude a collective agreement between the parties, but the arbitrator shall

not decide any matters that come within the jurisdiction of the Board." In exercising this function, subsection 10(2) of the Act states that "the arbitrator shall take into consideration all factors he/she considers relevant, including the following criteria:

1. The employer's ability to pay in light of its fiscal situation;
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased;
3. The economic situation in Ontario and the City of Toronto;
4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed;
5. The employer's ability to attract and retain qualified employees;
6. The purposes of the Public Sector Dispute Resolution Act, 1997.

The purposes of the Public Sector Dispute Resolution Act, 1997, as referenced above, are:

a) To ensure the expeditious resolution of disputes through collective bargaining;

b) To encourage the settlement of disputes through negotiation;

c) To encourage best practices that ensure the delivery of quality and effective public services that are affordable to taxpayers.

Not surprisingly, both parties made extensive submissions with respect to how these criteria should be applied.

The parties exchanged bargaining proposals on February 10, 2011 and met regularly between that date and July 16, 2011. A conciliation officer met with the parties on March 4, 2011 and a "no board" report issued on October 6, 2011. The mediation component of these proceedings took place on December 7, 2011. Whereas the parties are to be commended for having narrowed the issues in dispute, the following items have been referred to arbitration for determination.

Union Items

- Improve contracting out protections
- Reasonable wage increases in each year
- Shortage allowance update
- Improvements to employee benefits
- Improvements to vacation entitlement
- Transfer to different locations/modes

More specifically, the Union demand for a wage increase each year is for a three-year agreement with across the board wage increases effective on each of the anniversary dates, as follows:

Effective April 1, 2011	3%
Effective April 1, 2012	3%
Effective April 1, 2013	2.75%

The TTC proposals are as follows:

- There should be no wage increase provided to the Union's members for the duration of the renewal collective agreement.
- The term of the collective agreement should be four (4) years.
- The restrictions on the Employer's ability to contract out work set out in article 1, section 37 of the collective agreement should be deleted.
- The letters of intent at Appendix E-17 and Appendix E-17-A to the collective agreement regarding the ratio of TTC vehicles to taxicabs that are used to provide Wheel-Trans service must be adjusted, such that not less than 38% of Wheels Trans service is provided by Wheel-Trans buses, with the remainder performed by contracted taxicabs.
- The language in article 1, section 18 of the collective agreement that states that an employee will not be required to provide a medical note for the first five days of absence in each calendar year for sickness or injury, yet will remain eligible for Sick Benefit Association benefits during that time, should be deleted.
- The Sunday work premium set out in article 1, section 12 of the collective agreement should be deleted.

It is important to emphasize that the TTC's economic proposal is a four-year compensation freeze. It should also be noted that the TTC seeks to remove from the collective agreement the existing restrictions upon its right to contract out.

The compensation and contracting out issues proved incapable of resolution between the parties and cast a shadow over the negotiations. Both issues call into play and require a careful balancing of the statutory factors. In support of an inability to pay argument, the TTC relies upon the $39 million shortfall in its 2012 operating budget and a further $60.9 million shortfall in the Wheel-Trans 2012 operating budget, which do not take account of any wage increases; the City's request to meet a budget reduction target of $46.1 million, i.e. 10%, in addition to dealing with the $49 million budget shortfall; and the cost containment and revenue producing, i.e. $0.10 fare increase, measures that have been recommended. I am reminded that in the final analysis the TTC operating budget was reduced by some $25 million for 2012 and the Wheel-Trans operating budget was reduced by some $11 million in 2012. The Employer argues that it is unrealistic to think in terms of increased subsidies or further fare increases beyond the $0.10 per rider per year fare increases planned for 2013, 2014 and 2015 when the current fares already exceed the national average of major, i.e. 400,000+ population, transit services. The Employer also points to the economic situation in the City of Toronto with an operating budget shortfall for 2012 of some $774 million and the provincial austerity program necessitated by a $15 billion provincial debt. Reference is made to the recently released Drummond Report as underscoring the difficult economic times faced by the province and the need for drastic expenditure reduction. The Employer advises that 73% of its operating budget

is consumed by employee compensation and that each 1% increase in Union compensation results in an $8 million increase in operating costs.

The Union maintains that the current recession has been much shallower than the 2008 downturn and that we are currently in a recovery mode. The Union relies upon the employment and GDP numbers to support this assertion as it pertains to the economy generally and to total taxable property assessment value and total value of building permits as it applies to the City of Toronto. With direct reference to the TTC, the Union points out that the TTC, although the third largest public transit system in North America, behind only New York City and Mexico City, is the most under-subsidized public transit system in North America, at $0.88 per rider. I am asked to compare Montreal at $1.19 per rider, Ottawa (OC Transpo) at $2.35 per rider and Vancouver at $3.07 per rider. I am asked to note, as well, that although the largest public transit service in Canada, the TTC fares are only $0.15 higher than the national average of transit systems serving populations greater than 400,000. In reference to the City, the Union emphasizes that the $700 million 2012 budget deficit has become an almost $300 million budget surplus. In addition, reference is made to a City of Toronto mill rate that is lower than any surrounding municipality, the political decision to freeze municipal taxes in 2011 and the decision to eliminate the personal vehicle tax. The Union asserts that in all the circumstances, there is no inability to pay but rather an unwillingness to pay. It is submitted that an unwillingness to pay cannot be relied upon to justify below normative compensation increases. Neither, it is

submitted, can a broken funding model be relied upon to shrink the funds that should otherwise be available to operate the system.

The Union maintains that because, under free collective bargaining, it possessed superior bargaining power and because, against its will, it has been deprived of the right to strike and deemed to be an essential service, it must now be allowed to rely on the other essential services, i.e. police and fire, as comparators for purposes of determining appropriate compensation increases. Not surprisingly, the Employer takes issue with this contention, arguing that if compensation increases were justified (which it disputes), the appropriate comparators remain as the other transit properties in this geographic area. In reply, the Union maintains that if this is so, the effect of having been deprived of its right to strike will be to prevent it, as the largest and most complex transit system in the region, from continuing to establish the pattern.

Turning to the issue of contracting out. The Union seeks a significant added restriction upon the Employer's right to contract out. Under the current language, the Employer is permitted to contract out so long as "employees shall not be laid off or terminated as a direct result of contracting out of work which is normally performed by members of the bargaining unit." The Union seeks to add the further restriction that "there shall be no reduction of the total number of members in either maintenance or transportation departments as of March 31, 2011 as a result of contracting out of bargaining unit work." In other words, the Union seeks to disallow contracting out if

the effect is to reduce the number of employees in the bargaining unit and thereby to eliminate the possibility of contracting out to the extent that would otherwise be permitted by attrition. The Union characterizes its demand in this regard as incremental, as compared to the extreme "breakthrough" position of the Employer.

As noted, the Employer seeks to remove the existing restrictions against contracting out in their entirety. The Employer advised the Union in bargaining that it was investigating the potential contracting out of some 24 functions. However, the Employer did not provide a careful analysis regarding the expected economic benefit or the employee impact. However, reference was made in its brief to cost savings of $1.14 million/year from contracting out waste management and $6.4 million over two years from contracting out bus service and cleaning lines, for contracts let under the existing language.

Under the headings of Benefits and Vacations, the Union seeks improvements commensurate with improvements gained by the employees of other transit properties. The Employer, consistent with its desired compensation freeze, seeks a "standstill" under these headings.

The Union seeks to ensure that employees who have requested a transfer be accommodated prior to placing a new hire in the position sought. The Employer explained the administrative difficulties.

The Union also seeks to amend the shortage allowance language to reflect the current $710 amount. The Employer asserts that there is no confusion as to the

amount and maintains that the allowance language has been fairly and consistently administered.

The Employer seeks to delete the exemption from producing a medical note for the first five days of absence in each calendar year based upon an expected reduction in the rate of absenteeism if deleted. The Employer also seeks to remove the wage premium for Sunday work. The Union objects to both of these proposals on the grounds that to do so would create sub-normative conditions.

Apart from term, the final issue in dispute concerns the "modal split" that applies to Wheel-Trans operations. The Employer seeks to have the ratio respecting the use of Wheel-Trans buses to the use of third-party accessible and sedan taxicabs, as set out in letter of intent E-17-A, reset at "no less than 38% of Wheel Trans buses and no more than 62% accessible taxicabs and sedan taxicabs." The stated ratio is currently set at 40.1% to 49.9%. However, the actual ratio is currently 62% taxicab and 38% bus. The Union, although it granted a "forbearance" from compliance with the stated ratio, objects to having the stated ratio amended on the grounds that if the stated ratio was amended as per the Employer proposal, the result would be the elimination of 111 operator positions that should be attached to Wheel-Trans buses.

Finally, there is the issue of term. The Union seeks a three-year term while the Employer seeks a four-year term. The Union argues in favour of a three-year term on the basis of the historical pattern between these parties, on the basis that four years is unhealthy for the relationship because issues that require attention are left unattended

for too long and on the basis that a four-year term will coincide with Union elections and thereby politicize bargaining. The Union also submits that employers usually pay for a fourth year. The Employer, on the other hand, promotes a four-year term on the basis that in recent rounds of collective bargaining, seven Ontario transit providers have concluded collective agreements for terms longer than three years, of which five have been for four years and one for five years. Reference is also made to the City of Toronto and CUPE collective agreement. The Employer argues that given this trend and given the fact that a four-year term provides greater stability and certainty, a four-year term should be awarded.

Absent the establishment of a demonstrated need, as that term is used in the interest arbitration setting, there is no basis upon which to remove from the collective agreement the existing contracting out restrictions and thereby give to the Employer an unfettered right in this regard. The restrictions that exist are normative and should not be deleted simply because the Employer seeks their deletion. The Employer has not justified its demand in this regard nor has it justified the granting of a limited power to unilaterally contract out any individual components of its operation on the basis of cost efficiency or the unavailability of the required skills. However, so too, given the existing restriction that protects the employment interests of individual employees, given the limited extent to which the Employer has contracted out in the past and given the comparable nature of the contracting out restrictions that exist

under other Ontario transit collective agreements, the Union has failed to make out a case for the awarding of the restriction that it seeks.

The first three criteria direct this arbitrator to consider the fiscal realities that prevail generally and as they impact the Employer particularly. The fourth criterion directs the arbitrator to consider the terms and conditions of employment, including compensation of comparable employees. In most cases, including this one, the application of these criteria requires that a balance be struck. The fifth criterion, the Employer's ability to attract and retain qualified employees, serves to tilt the balance depending upon the factual determinations. The sixth criterion, the purpose of the Public Sector Disputes Resolution Act, does the same thing, especially the direction "to encourage best practices that ensure the delivery of quality and effective public services that are affordable to taxpayers."

In a case such as this where a compensation freeze is sought on the basis of an inability to pay, the first step in the analysis is to identify the proper comparator group. This is so because in order to determine whether the fiscal reality supports the claim, it must first be determined what it is that the Employer would otherwise be required to pay. In other words, there must be an answer to the question – an ability to pay what?

In this case, the Union seeks wage increases that are more reflective of police and fire increases than transit increases. It does so on the basis that the TTC has now been declared an essential service subject to interest arbitration, as are the police and

fire services. This is an untenable proposition. The purpose of an interest arbitration is to replicate to the greatest extent possible what could reasonably be expected through free collective bargaining. This Union, even though it had considerable bargaining power, looked to transit when it bargained freely – not to police or fire. The fact of being declared essential does not create a comparator linkage to other essential services. Indeed, if this were the case, the Employer would properly be able to rely on health care comparators. The comparator group remains the same – that is, other transit properties where employees perform comparable work and have bargained freely. In this regard, the landscape is set through 2013 with 2% annual across the board wage increases. The data submitted by both parties support this finding.

While I do not reject the assertion by the Union that this property has led the way, as evidenced by the GTA clause, and should continue to lead the way, it seems to me that at this early juncture under the interest arbitration regime, the absolute relativities have been set through the previous rounds of free collective bargaining. It follows that the awarding of the normative across the board percentage wage increases applicable to transit properties at this time would preserve the absolute relativity.

The answer to the question – ability to pay what? – is that, were it not for the TTC-related fiscal considerations raised by the Employer, the award, having regard to the general fiscal environment and to the comparator freely negotiated settlements, would be for 2% annual across the board wage increases. On a close analysis, I have not been convinced that the fiscal reality that forms the basis for the application of the

first three statutory criteria overrides the fourth criterion that requires a comparison between these employees and those doing comparable work, especially in circumstances where a clear pattern in this regard already exist. While there can be no dispute that the economy is struggling and that the Employer is under budgetary constraint, a comparative pattern has been set and it has been set at a level that can and should be met by the Employer. It should be met by the Employer because it is consistent with the past bargaining between these parties and because the fiscal constraints are not so severe as to prevent the Employer from meeting the pattern. The application of the fifth and sixth criteria does not dissuade me in this regard.

I have been persuaded that a three-year term is to be preferred. A three-year term is to be preferred because, firstly, it reflects the pattern of three-year terms established by these parties; secondly, the wage pattern has been set for three years but not for four years; and thirdly, a three-year term, because it avoids conducting bargaining coincidental with the Union's election cycle, lessens the risk of politicizing the collective bargaining process and thereby enhances the chance of success at the bargaining table.

Finally, in regard to benefits, vacations, sick leave and premiums, I have looked to the comparator systems and thereby arrived at a result that reflects a proper balancing of the criteria within the context of the overall award. As for the "modal split" that applies to Wheel-Trans operations, the current arrangement should be reflected in the collective agreement. To the extent that the position of the Union in

this regard could be relied upon as notice to end an estoppel and thereby support a claim for 111 additional jobs, the Employer should be relieved of that potential liability.

Having regard to all of the foregoing, I hereby award as follows.

A W A R D

The parties are hereby directed to enter into a renewal collective agreement to the collective agreement between them that expired March 31, 2011 that contains all the terms and conditions of the predecessor collective agreement, including the extension of all expiring letters of understanding, appendices, articles and schedules for the life of the agreement (not including the GTA clause), save and except that it is amended to incorporate:

1. All matters agreed between the parties prior to the date hereof;

2. A term to expire March 31, 2014;

3. Across the board percentage wage increases:

Effective April 1, 2011	2%
Effective April 1, 2012	2%
Effective April 1, 2013	2%

4. Wage retroactivity is to be based on all paid hours from the expiry of the predecessor collective agreement. Payment to current employees is to be made within 60 days of the date hereof. Former employees are to be notified of their entitlement in writing at the last address on file within 30 days of the date hereof and are to be paid within 30 days of acknowledgement of receipt of notice.

5. Effective the date of award, delete the language of article 1, section 18 of the collective agreement that states that an employee will not be required to provide a medical note for the first five days of absence in each calendar year for sickness or injury yet will remain eligible for Sick Benefit Association benefits during that time.

6. Effective the date of award, adjust the letters of intent at Appendix E-17 and Appendix E-17-A to the collective agreement regarding the ratio of TTC

vehicles to taxicabs that are used to provide Wheel-Trans service such that sixty-two percent (62%) of the service is provided by taxicabs and the remaining thirty-eight percent (38%) is provided by Commission vehicles.

7. Effective January 1, 2013, amend article 1, section 13, as follows:

- Four Weeks Vacation – to employees commencing with the regular vacation period in the year in which their 8th anniversary falls;

- Five Weeks Vacation – to employees commencing with the regular vacation period in the year in which their 16th anniversary falls;

- Six Weeks Vacation – to employees commencing with the regular vacation period in the year in which their 22nd anniversary falls.

8. Effective January 1, 2013 improve benefits for employees (not pensioners), as follows:

(i) Coordination of Employee Benefits where two employees both work at the TTC;

(ii) Vision Care – eyeglasses and eye exam combined to a maximum or corrective laser surgery to a maximum as follows: $400 maximum for eyeglasses and eye exam or corrective laser surgery to a maximum of $400;

(iii) Massage Therapy - $50 per visit, maximum of $500 per year, and must be supported by a physician's medical certificate;

(iv) Semi-private coverage to employees – 50% paid by the Commission to a $250 daily maximum.

Items not referred to are not awarded.

I remain seized until the parties enter into a formal collective agreement.

Dated this 4th day of June 2012, in the City of Toronto.

Kevin Burkett

KEVIN BURKETT