

**LUMCO/MARCO/OAPSB**  
**Emergency Services Steering Committee**  
**(ESSC)**

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# Position Paper

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Escalating Emergency Services Labour Costs  
and the Ontario Taxpayers' Ability to Pay



April 8, 2011

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## About the ESSC

The Emergency Services Steering Committee (ESSC) is a joint committee of the municipalities of the Large Urban Mayors Caucus of Ontario (LUMCO), the Mayors and Regional Chairs of Ontario (MARCO), and the Ontario Association of Police Services Boards (OAPSB). The ESSC was established in November 2005 to coordinate activities related to labour cost containment in emergency services (police, fire and emergency medical services/EMS).

## Purpose of this Paper

The purpose of this paper is to present some of the significant factors which the ESSC has identified that we believe are contributing to rising emergency services labour costs (wages and benefits) and the effects that they are having on Ontario municipalities and the public services they provide. It is the position of the ESSC, on behalf of MARCO/LUMCO municipal employers, that these cost increases are not sustainable in the long term and that these costs are being driven higher as a consequence of arbitration awards that have not fully considered or properly accounted for the current Ontario and local economies or the taxpayers' ability to pay, and the influence of such awards on negotiated settlements.

Arbitrators and arbitration boards are obliged by law to consider these factors, along with others, in an attempt to deliver an award that provides for a fair compensation increase while at the same time ensuring that municipalities can continue to provide taxpayers with the services and infrastructure they deserve and need.

This paper includes the following:

- an executive summary;
- a summary of the rising emergency services labour costs and their effect on municipalities;
- a summary of how the employers' ability to pay in light of its fiscal situation is not being considered by arbitrators/arbitration boards;
- the experiences of Ontario municipalities that have tried to make the ability to pay argument; and
- considerations and criteria that would assist arbitrators/arbitration boards in properly assessing a municipality's economic situation, its ability to pay and its taxpayers' ability to pay.

## Executive Summary

Municipalities recognize that emergency services professionals work in dangerous settings and should be highly respected. However, labour costs and increases within the emergency services sector continue to rise at rates that are exceeding those in other sectors and include higher wage increases, better benefits and retirement plans. Such increases are not being enjoyed by most taxpayers. In fact, many taxpayers are underemployed or facing layoffs. In addition, the disproportionate increase of costs in the emergency services sector is adding to the eroding ability of municipalities to fund key projects and essential programs. It is the Employer's position that the generous emergency services settlements will, at some point, be met with public backlash.<sup>1</sup>

It is the Employer's position that a large part of the municipal employers' decreasing control over these costs is attributable to the current interest arbitration system in the Province of Ontario. In the EMS sector, a strike/lockout model of collective bargaining is available at law but rarely used because it is not operationally feasible in many cases and the risk of decreased public safety is not acceptable to many municipalities. But in the police and fire sectors employees do not have the right to strike and therefore, by law, the parties are required to rely on binding interest arbitration to resolve bargaining disputes. Based on the data available, and the rationale provided in many of the interest arbitration awards, it appears that the interest arbitration process in Ontario for emergency services continues to raise costs to the taxpayer, as it is the Employer's position that the current process routinely fails to properly consider the criteria set out under the applicable legislation.

There are five basic criteria set out in the *Police Services Act, 1990*, the *Fire Protection and Prevention Act, 1997*, the *Public Sector Dispute Resolution Act, 1997*, and the *Ambulance Services Collective Bargaining Act, 2001*, that arbitrators and arbitration boards must consider when making decisions.

For example, section 50.5 (2) of the *Fire Protection and Prevention Act, 1997*, states as follows:

*In making a decision, the board of arbitration shall take into consideration all factors the board 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 have to be reduced, in light of the decision, if current funding and taxation levels are not increased*
- 3. The economic situation in Ontario and in the municipality*

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<sup>1</sup> Vollmar, John, "Many in City Can't Afford Higher Costs". *Sarnia Observer* November 2, 2007, Web. Retrieved from [www.FPInfomart.ca](http://www.FPInfomart.ca), 2007, and, "These Deals Treat Taxpayers Poorly". *Kitchener Record*, March retrieved March 18, 2008, Web. from [www.FPInfomart.ca](http://www.FPInfomart.ca)

4. *A comparison, as between firefighters 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 firefighters*

The *Police Services Act* contains similar criteria along with two additional criteria which are (i) the interest and welfare of the community served by the police force and (ii) any local factors affecting that community.

At arbitrations in the past, municipalities have presented arguments based on *“the employer's ability to pay in light of its fiscal situation”* and *“the economic situation in Ontario and in the municipality”*. However, in most of the interest arbitration awards delivered in 2010, arbitrators/arbitration boards did not provide any rationale for their decisions which has the effect of failing to establish that these two criteria (which are required by law) were considered and if they were considered how that analysis was completed.

Arbitrators often base their awards on settlements in geographic areas and pattern bargaining and rely upon the interest arbitration principle of *“application”* in doing so. However, it is the Employer's position that this principle must give way when, based on the local criteria such as the municipality's ability to pay and/or the local and Ontario taxpayers' ability to pay, a case for doing so is established.

Arbitrators and arbitration boards also typically rely upon the comparative wage and benefits data from other emergency services but too often do not appear to consider contracts in the same community for non-emergency services personnel which would more appropriately indicate the local economic situation. There needs to be a focus on the overall compensation (wages and benefits) of other union and non-union employees in the same community, who work and live in the same community, use the same community resources and contribute to the same municipal tax base. This comparison should not be limited to emergency services personnel.

### **1. Emergency services wage and benefits awards have exceeded other awards, the rate of inflation and the cost of living.**

In 1991, arbitrator Martin Teplitsky stated that *“the goal of compulsory binding arbitration is to ensure that employees affected by the loss of the right to strike fare as well, although no better, than employees whose settlements are negotiated within the customary framework of the right to strike and lockout.”*<sup>2</sup>

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<sup>2</sup> Teplitsky, Martin, City of Windsor/Windsor Professional Firefighters' Association, Arbitrated award, (1991)

The first part of this paper will discuss the increases that have occurred over the past five years in emergency services compensation. It will show how these increases have exceeded the rate of inflation and the cost of living. It will highlight the fact that the increases experienced in the emergency services sector, which is bound by compulsory binding interest arbitration (with the limited exception for municipalities that can operationally engage in a strike or lockout with their EMS personnel), have actually exceeded those of other employees and that it is the Employer's position that interest arbitrators/arbitration boards have contributed greatly to this problem through what is perceived as an improper or inadequate consideration of local wage settlements.

## **2. Increasing wages and benefits are not sustainable.**

Municipalities and their taxpayers bear the burden of rising emergency services costs through higher taxes and the potential reduction or even elimination of other services. The second part of this paper will highlight examples of other resources which could have been purchased with the same dollars that funded increases in emergency services compensation.

Public sector unions attempt to limit the discussion to that of wage differences. However, the principle of total compensation must be given weight and this must necessarily include public sector pensions. It is only when this complete analysis is undertaken that a full picture of the rising labour costs in emergency services is provided. There is a need to consider the taxpayers' ability to pay for the generous retirement plans in the public sector while not benefiting from similar advantages themselves.

## **3. Arbitrators/arbitration boards ignore the ability of the municipality to pay in light of its economic situation and the impact on taxpayers who, in essence, are the municipality.**

Arbitration awards continue to be based on comparisons to awards and settlements in other emergency services without proper consideration of the local realities and pressures which include a municipality's economic situation and the taxpayers' ability to pay. The ability to pay does not appear to be adequately considered, if it is even considered at all, even though it is one of the criteria under the various legislative schemes that arbitrators are legally required to consider and apply. Historically, many arbitrators have taken the position that governments have an infinite ability to pay simply by raising taxes or running deficits. This unwillingness to pay instead of ability to pay is the same theme that emergency services unions and associations have trumpeted at the bargaining table which leaves municipalities between two immovable views.

Unfortunately, wages and other monetary improvements are too often viewed in isolation in many comparisons/settlements without proper consideration of the total compensation. Based on the analysis completed at this stage of the development of this position, it appears that interest arbitration decisions have not taken into consideration the taxpayers' capacity to absorb the current and future rise in costs associated with the total compensation (wages, benefits and pensions) in each award.

#### **4. This paper recommends criteria for arbitrators/arbitration boards to consider.**

It is the position of municipal Employers that there needs to be a change in focus from statistical information on a superficial level, which often appears to be rooted simply in historical comparisons, to more meaningful comparisons and analysis of the ability to pay and the economic/financial situations facing many municipalities and the Province of Ontario in general. We believe that, in addition to comparing emergency service employees to other emergency service employees, comparing emergency services wages to those of other union and non-union employees within the same community will provide a better and more complete indication of taxpayers' ability to pay than does only comparing them to the wages of other emergency services employees. The comparison between emergency services is necessary, but it should not be determinative and a more fulsome comparison as set out herein is required.

In 1996, Arbitrator Richard L. Jackson, in the matter of Guelph Police Services Board and Guelph Police Association stated, *"First it is simply unrealistic for any group, police or otherwise, to expect that comparisons for salary determination purposes will be made only with other people in the same group..."*<sup>3</sup>

Arbitrators/arbitration boards should be required to apply local economic criteria and to consider the financial impact of settlements on the municipality and its wages within other programs and services. This paper provides several factors that the ESSC has identified at this time that should be considered when evaluating and determining what a municipality's economic situation truly is and its ability to pay. Furthermore, the arbitration process should require that an arbitrator/arbitration board demonstrates its consideration for each of the listed criteria. While some of the recommendations contained in this paper may not be supported by arbitrators, it is the Employer's position that any concerns raised by arbitrators are more appropriately dealt with through the system used to appoint arbitrators instead of being used as a reason to stifle the ESSC's requests for change as outlined in this paper.

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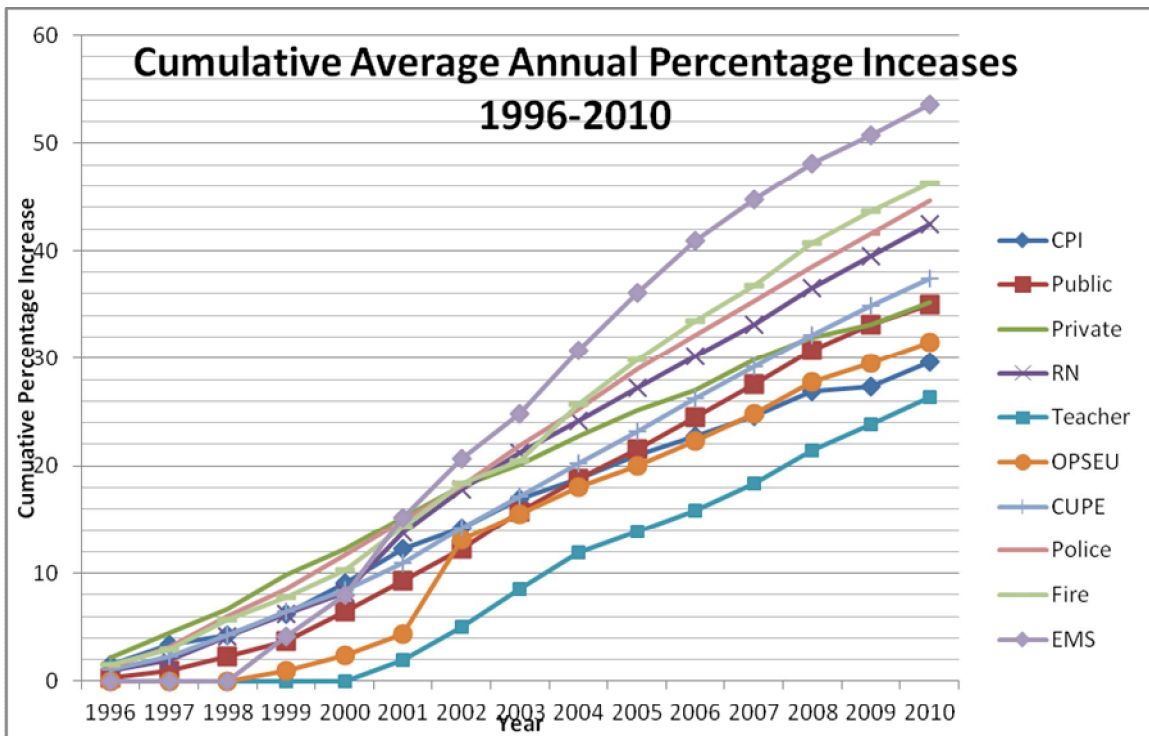
<sup>3</sup> Jackson, Richard L., Guelph Police Services Board/Guelph Police Association, Arbitrated award (March 1996)

# #1. Emergency Services Wages and Benefits Awards Exceeding Others

*“The goal of compulsory binding arbitration is to ensure that employees affected by the loss of the right to strike fare as well, although no better, than employees whose settlements are negotiated within the customary framework of the right to strike and lockout.” (Arbitrator Martin Teplitsky, 1991)<sup>4</sup>*

The Consumer Price Index (CPI) has historically been considered a relevant in determining wage increases. Since 1992, the CPI and the rate of inflation have ranged from 1% to approximately 3% per year (with the exception of 1998 at 0.9% and 2009 at 0.4%). The cumulative wage increases negotiated and awarded for police, fire and paramedics have greatly exceeded the CPI increases, increases among Ontario’s general public and private sector employees, general CUPE and OPSEU employees, and Registered Nurses and teachers. In fact, over the past 15 years, emergency services employees have received cumulative wage increases which have exceeded the CPI by between 50% and 80%.

Table 1



(Note: the rates represent only the base increases to annual salaries, not increases for 3/6/9 bonuses, etc. The foregoing data does not contain the effect of retention pay compensation bonuses on police/fire.

[Source: Combined sources of Collective Bargaining Information Services and various collective agreements and arbitration awards. Police, (Big 12 and OPP), Fire and EMS rates are based on the increase from year to year of the average annual salary. CUPE increases represent an approximation of various separate CUPE settlements.]

<sup>4</sup> Teplitsky, Martin, City of Windsor/Windsor Professional Firefighters Association, Arbitrated award, (1991)



Looking at these years, the cumulative wage increases for police, fire and paramedics have clearly exceeded the other cumulative increases. Consider that the emergency services exceeded these comparators between 2005 and 2010 as follows:

- CPI by 77% (Police), 89% (Fire) and 110% (EMS);
- Average public sector increases by 19% (Police), 27% (Fire) and 41% (EMS);
- ONA Nurses by approximately 6% (Police), 13% (Fire) and 25% (EMS);
- Teachers by approximately 33% (Police), 42% (Fire) and 58% (EMS);
- OPSEU (OPS) by 43% (Police), 53% (Fire) and 70% (EMS); and
- CUPE by 11.5% (Police), 19% (Fire) and 32% (EMS)

It is interesting to note that the closest comparator group to the emergency services is the other employee group that is governed by interest arbitration (ONA pursuant to the Hospital Labour Disputes Arbitration Act). Furthermore, while there may be some differences in the numerical data if smaller police and fire services whose settlements and arbitration awards over the past years are not known or reported, the statistical difference between these groups at this point demonstrates that there is clearly an issue that needs to be addressed. Compounding this fact is that emergency services programs consist mostly of employee salaries, making increases to wages a significant factor in overall budget pressures.

Ontario Ministry of Labour statistics for 2009 show wage increases for all public and private settlements of 2.1%. For 2010, the overall average is 2.3%. Here are some examples of increases in other public sectors:

**Table 2 - Recent Provincial Settlements**

Organization	2009	2010	2011	2012
OPSEU (Ontario Public Service Employees Union)	1.75%	2.0%	2.0%	2.0%
AMAPCEO (Assoc. of Mgmt. Admin. Prof. & Crown employees)	1.75%	2.0%	2.0%	
Hospital Employees ( CUPE)	2.0%	2.0%	2.0%	2.0%
Nurses (ONA)		3.0%	3.0%	3.0%
Teachers . (Provincial Elementary schools)	2.5%	2.5%	2.5%	2.5%

(Source: Settlement Tables prepared for Midwestern Ontario Geographic Working Group)

**Table 3 - Other Recent Municipal Settlements**

Organization	2009	2010	2011	2012
Niagara Region	2.5%	2.5%		
Windsor	1.0%	1.5%	1.8%	2.0%
Toronto	1.75%	2.0%	2.25%	
Sudbury	3.0%	2.5%	2.4%	2.3%
Vaughan		1.75%/1.25%	1.0%/2.0%	3.0%
York Region		2.35%	2.35%	2%/1%

(Source: Settlement Tables prepared for Midwestern Ontario Geographic Working Group)

Below is a listing of emergency services interest arbitration awards in comparison. It is not difficult to see that these awards exceed the averages and are excessive in the time when the worst economic situation in Ontario in memory continues to be an influence.

### Recent Emergency Services Interest Arbitration Awards

Municipality	Date issued	2006	2007	2008	2009	2010	2011	2012
Orangeville Police	April 2010				3.60%	3.80%	3.80%	
Napanee Fire	April 2010			9.23%	2.78%	5.25%		
Hamilton Fire	Mar 2010	3.31%	3.16%	3.08%	3.00%			
Windsor Fire	Dec 2009	3.16%	3.19%	3.15%	3.10%			
Vaughan Fire	Sept 2010					1.75/1.25	1.0/2.0	3.00
Niagara Police	July 2010				2%/1.2%	2%/1.125%	2%/1.25	
Fort Frances Fire <sup>1</sup>	Feb 2011				2%/1%	2%/2%	2%/2%	3%/2%
Chatham Kent Fire	Sept 2010				2%/1%	Parity with police when known		

<sup>1</sup> Plus the introduction of retention pay of 2%/4%/6% in 2011 and 3%/6%/9% in 2012 and retiree benefit amendments.

These tables clearly indicate that emergency services employees with compulsory binding interest arbitration have actually fared better in general (and in some cases much better) than other public sector employees. It is the Employer's position that this suggests that the arbitration system in Ontario requires review. At this time, absent further discussions with respect to potential alternatives, it is the Employer's position that legislative change to correct this inequity is required.

***"Funding the police is the single biggest cost of the regional budget – about one third of the entire tax levy."*** (Waterloo Regional Councillor and Police Services Board Chair Tom Galloway - Cambridge Times, November 24, 2010)<sup>5</sup>

A similar trend exists with respect to benefit increases within the emergency services sector. It is the ESSC's view, based on the reported interest arbitration awards, that arbitrators and arbitration boards have focused more on the benefit entitlements of emergency services personnel in other municipalities rather than on the benefit entitlements of non-emergency services employees (and even non-union employees) employed in the same municipality.

<sup>5</sup> Cambridge Times, (2010) Waterloo Regional Councillor and Police Services Board Chair, Tom Galloway, Cambridge Times, Retrieved November 25, 2010 from: <http://www.cambridgetimes.ca/news/local/article/907704--police-get-six-per-cent-raise>

In this regard, the ESSC takes the position that the benefit entitlements of employees employed by the same employer in the same municipality are the more appropriate comparator, especially when the criteria of ability to pay and/or the municipal situation are considered (the need for internal comparison is even greater when one considers that often a large part of the benefits costs are associated with dependents or spouses who are not even employed in the emergency services sector and thus not facing those same working conditions)

## #2. Unsustainable Wage and Benefit Increases

The following award trends have contributed to the need to raise municipal taxes and/or have necessitated the need to scale back infrastructure projects and other services. Municipalities faced increased pressures in their 2011 budgets and many have to reduce services and/or introduce user fees to offset increasing labour costs.

An aggregated study of salaries, wages and benefits was undertaken from the 2009 Financial Information Returns (FIRs) of three (3) municipalities in Ontario with police, fire and ambulance services. The following is a summary of the findings:

### Aggregated Salaries, Wages and Benefits Costs

Year	Fire	Police	Ambulance	Total EMS Salaries, Wages & Benefits
2005	\$431,322,263	\$869,563,252	\$157,978,445	\$1,458,863,960
2006	\$457,335,712	\$933,884,594	\$168,714,957	\$1,559,935,263
2007	\$475,092,559	\$1,121,207,491	\$183,065,550	\$1,779,365,600
2008	\$507,223,843	\$1,087,778,776	\$192,995,388	\$1,787,998,007
2009	\$554,694,631	\$1,157,311,656	\$191,371,673	\$1,903,377,960

(Source: 2009 Financial Information Returns)

Based on the above:

- The reported total salaries, wages and benefits for emergency services have increased by \$444,514,000 or 30.47% from 2005 to 2009.
- Although, according to staffing numbers reported in these three municipalities there was only a 1.73% increase in fire staffing between 2005 and 2009, the total salaries, wages and benefits for the same period increased by 28.6%.
- Although, according to staffing numbers reported in these three municipalities there was a 7.2% increase in overall police staffing between 2005 and 2009, but the percentage dollar increase in salaries, wages and benefits was 33.1%.
- The reported total dollar increase in salaries, wages and staffing increased by \$33,393,228 or 21.1%.

Increased wages and benefits do not lead to increased or improved emergency services or improved public safety. In fact it can be argued that the service levels have decreased due to lack of available funding to replace equipment or hire additional personnel.

As examples, consider the following:

**Fire:**

According to the Ontario Association of Fire Chiefs (O AFC) Budget Submission to the Province in February 2008, 42% of all fire vehicles in Ontario were more than 15 years old and needing replacement. The average cost of a pumper truck at that time was \$425,000, the average cost of a tanker truck was \$250,000 and the average cost of an aerial truck was \$850,000.

Therefore the extra \$123 million spent on increased Fire wages and benefits from 2005-2009 in these three municipalities alone could have purchased the following:

- 289 new fire pumper trucks or,
- 492 new fire tankers or,
- 145 new aerial trucks

**Police:**

The cost compensation for one 1<sup>st</sup> Class Police Constable with 23 years or more of service has increased \$17,461 or 18.1% from 2005 to 2009

<b>2005 Peel Police Services</b> <small>(Source: John Nicol presentation, "The Municipal Challenge of Rapidly Rising Emergency Worker Labour Costs", July 2005)</small>		<b>2010 Peel Region Police Services</b> <small>(Source: Fred Biro presentation, "Is there a Future for Sustainable Public Policing?", August 2010)</small>	
Annual Base Salary	\$69,294	Annual Base Salary	\$81,010
Retention pay at 9%	\$ 6,236	Retention Pay at 9%	\$7,291
Statutory Holiday Pay	\$ 3,050	Statutory Holiday Pay	\$1,700
Payroll Taxes	\$ 2,800	Payroll Taxes	\$4,720
Pension	\$ 6,370	Pension	\$8,520
Medical/Dental	\$ 3,800	Medical/Dental	\$4,840
Additional Benefits	\$ 2,690	Additional Benefits	\$1,770
Misc	\$ 2,060	Misc.	\$3,910
<b>Total compensation cost of 1 officer</b> (does not include overtime, training, etc.)	<b>\$96,300</b>	<b>Total compensation cost of 1 officer</b> (does not include overtime, training, etc.)	<b>\$113,761</b>

According to information acquired from the Ontario Association of Chiefs of Police in 2009, the average cost of a new marked patrol vehicle was \$45,000 and the cost to hire new police officers was approx \$100,000 per hire. During the period 2005-2009, an additional 708 officers were hired.

Therefore the remaining extra \$288 million spent on increased police wages and benefits from 2005-2009 in these three municipalities alone could have paid for additional vehicle patrols or R.I.D.E. programs per year or purchased the following:

- 2,880 additional police officers, or
- 6,400 new police cruisers

## **Ambulance:**

According to information provided in 2009 from the Association of Municipal Emergency Medical Services of Ontario (AMEMSO), the average cost for one new Primary Care paramedic was \$87,260, the average cost of one new Advance Care paramedic was \$97,607 and the cost of one new, fully equipped ambulance was approximately \$157,500.

Therefore, the extra \$33 million spent on increased EMS wages and benefits from 2005-2009 in these three municipalities alone could have purchased the following:

- *378 additional Primary Care paramedics*
- *338 additional Advance Care paramedics*
- *209 additional fully-equipped ambulances*

We recognize that the global numbers cited above could not be entirely spent on equipment or infrastructure as the emergency services employees are entitled to wage increases which are fair and reasonable when the appropriate factors and criteria are all given their due weight. However, the comparison exercise outlined above is helpful in providing a real life example or perspective on the potential impact these increases can have on the operational flexibility of a municipality. It provides a comparison on the basis of tangible assets and it shows how at least a portion of these funds could otherwise be spent. These examples assume that the property tax rate remains at the current level however many municipalities are struggling to maintain these rates because of the burden they impose on taxpayers.

At least one Ontario municipality has been forced to reduce services as a direct result of the costs associated with an arbitration award. An arbitrator recently awarded the Fort Frances firefighters a 16% wage increase over 4 years, along with increases to recognition pay and retirement benefits. The Town is also facing significant increases in the costs of policing through the contract for service with the OPP. As a result, Council recently decided to reduce the number of firefighters and police cars in an effort to keep the property tax rate within a range that taxpayers can afford.

If this trend is permitted to continue, municipalities may be forced to consider all other options and alternatives. The need for municipalities to consider any of these alternatives is a strong indication of just how badly cities and towns are struggling.

- Follow U.S. cities and reduce the number of emergency services personnel (Newark laid off 167 police officers and cut 130 firefighter positions through attrition and Atlantic City has laid off 60 police officers and reduced firefighter positions by 13)
- Look at contracting police services from the Ontario Provincial Police
- Scale back fire stations/equipment
- Contracting out where possible
- Request special funding for emergency services from the province

Municipalities are not alone in their need to stop these wages and benefits trends. The Province agrees.

*From 2003-04 and 2009-10, Ontario government program expenses grew at an average rate of 7.6% per year. This growth was partially driven by public sector wage settlements that averaged 3% per year. Over the same period, private sector wages increased at an average of 2.1% per year and inflation averaged 1.9%. These trends simply cannot continue. Reducing the deficit and managing growth in interest on debt expense is critical to protecting services.*<sup>6</sup>

### **#3. Arbitrators Ignoring Ability to Pay and Economic Environment**

*"There is little economic rationale for using ability to pay as a criterion in arbitration, (Arbitrator Owen Shime – McMaster University /Faculty Association, 2006) and, "The parties know that the ability to pay has been rejected by interest arbitrators for at least four decades."*<sup>7</sup>

The quote above is alarming, especially given that it was made in the midst of uncertainty following the Provincial Government's pronouncement regarding public sector wage increase expectations in March of 2010. However, it is indicative of the problem that municipal employers perceive within the interest arbitration process in general and it is equally applicable to the emergency services sector.

A major cause of wage and benefits inflation is the lack of true free collective bargaining in the emergency services sectors. Employers in the emergency services sectors have lost faith in the arbitration process to deliver a fair result because they believe that arbitrators will not properly consider the requisite criteria under the applicable legislative scheme. Municipalities view arbitration as a largely hopeless endeavour and therefore seek to avoid the unnecessary costs and uncertainty associated with same. On the other hand, Associations/Unions appear to view interest arbitration as a less risky proposition and the compensation increases awarded, and statements such as those outlined above, appear to support that view. This combination results in an uneven playing field in collective bargaining.

Prior to the enactment of statutory criteria governing interest arbitration, arbitrators were not provided with any criteria to guide their decision-making. In this legislative vacuum two arbitral doctrines emerged: the replication theory in which an interest arbitrator seeks to replicate the agreement the parties would have reached themselves through free collective bargaining; and the ability to pay doctrine which applied only to government employers. This doctrine assumed that governments should not be able to

<sup>6</sup> FAQ: Public Sector Compensation Restraint, retrieved July 2010 from : [http://www.fin.gov.on.ca/en/budget/ontariobudgets/2010/faq\\_july.html](http://www.fin.gov.on.ca/en/budget/ontariobudgets/2010/faq_july.html)

<sup>7</sup> Arbitrator Owen Shime, (2006) McMaster University Award, referred to by Arbitrator Martin Teplitsky (2010) in UTFA Award October 2010, retrieved from: <http://www.utfa.org/images/file/SBP%20Teplitsky%20Award%20for%202009-10-11.pdf>

claim an inability to pay increased wages to their employees because they have an unfettered ability to levy taxes.<sup>8</sup>

Since employers in the emergency services sectors have lost faith in the theory of free collective bargaining+as stated above, the doctrine of application+is not a concept that appears to deliver meaningful or acceptable results. Arbitrators are left to determine what they believe should be awarded with little reference to what the parties would have agreed to in the context of free+collective bargaining, and in doing so they continue to apply the ability to pay+doctrine stated above.

In the light of the fiscal implications of labour costs within emergency services and the pressures these costs create for municipal and provincial governments, the decisions of these arbitrators have a significant, direct impact on governments and taxpayers yet they have no accountability for the decisions they render.<sup>9</sup>

Statutory criteria governing the decisions of interest arbitrators was first introduced in the police sector in 1991, followed by the fire sector (1997) and EMS (2001).The ability to pay+was expanded to include the ability of the employer to pay in light of its fiscal situation.+The explicit inclusion of the expanded definition of ability to pay in the list of statutorily mandated criteria indicates that arbitrators/arbitration boards are to consider whether or not the employer has the ability to pay rather than presuming the employer has an inherent ability to pay, which was the case in the pre-legislative ability to pay+doctrine. Based on the analysis of the arbitral case law, it is the Employer's position that this has not occurred in a meaningful way. Municipal employers have made the argument that they lack the ability to pay but such evidence is not being considered by arbitrators. All too often arbitrators/arbitration boards have entirely dismissed such arguments despite the fiscal realities of public sector employers. There is no accountability for the failure of arbitrators/boards of arbitration to apply the statutorily mandated criteria.

A good example of this thinking is found in the Chatham-Kent Professional Fire Fighters Association award, September 2010, wherein the arbitrator said, "*The salary of the first class fire fighter in Chatham-Kent and the first class constable of the Chatham-Kent police force have been identical since 2000*" and then continued on to say, "*In spite of the economic data presented, we think it is appropriate to maintain this historical parity and award the rates.*" This statement implies that there was at least arguably relevant and important data to support a reduced wage increase but that the historical relationship in wage parity was more important. The legislative criteria do not appear to support this type of rationale.

Arbitrators continue to express their belief that a municipality has an endless+ability to pay because they can increase property taxes to cover additional costs. In one case, an arbitrator perceived the municipality to be rich and used the approach that if it can pay, it should pay. Associations have also indicated a belief that municipalities always have the ability to pay

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<sup>8</sup> *Government Intervention in Collective Bargaining Disputes: The Changing Landscape+*, Donald R. Munroe, Q.C. , Canadian Bar Association 2010 National Administrative Law Conference (November 26, 2010)

<sup>9</sup> *Government Intervention in Collective Bargaining Disputes: The Changing Landscape+*, Donald R. Munroe, Q.C. , Canadian Bar Association 2010 National Administrative Law Conference (November 26, 2010)

because they can tax to do so. Such thinking fails to consider the ability of taxpayers to pay and fails to fully apply the statutory ability to pay criteria.

Arbitrators/arbitration boards have generally not considered comparisons to settlements negotiated between the municipality and its non-emergency service bargaining units (and the compensation awarded to non-union employees) and the impact that higher wage increases (and collective agreement improvements in general) in the emergency services will have on other municipal services. Instead they compare to awards and settlements in other emergency services (and in most cases this means a comparison to other municipalities) without regard for local realities.

Arbitration awards based on replication too often rely on isolated examples from selected settlements and perceived bargaining trends within emergency services. They often do not take into consideration other local private and public sector union settlements (at least their stated analysis and reasoning does not reflect this) and in the view of the ESSC this is the wrong analysis. Instead, arbitrators and arbitration boards should openly focus on local issues through comparisons to other local employee groups, not just emergency services employees. The wages of other unionized and non-unionized employees who work and live in the same community, use the same resources and contribute to the same municipal tax base, would appear to be a better indicator of the local economy, as opposed to simplistic comparisons to police, fire fighters or EMS employees in other communities.

Prior to 1991, Arbitrator Martin Teplitsky stated in his award in the City of Windsor, that *what an interest arbitrator must do is determine what the community generally is obtaining by way of wage settlements and must take that fact into account as a relevant consideration in determining an appropriate salary increase.*<sup>10</sup>

The ESSC agrees with that analysis. The problem is that it has not been replicated in subsequent awards. A municipality's presentation of the fundamentals of its finances should bear heavily on arbitrated decisions. Awards must reflect the municipality's true economic situation. This rationale and analysis, however, has not been consistently applied.

### **Recent Experiences with the "Ability to Pay" Argument:**

Two recent cases are reflective of the concerns that municipalities have expressed regarding the interest arbitration process in Ontario as set out above.

#### **Case #1 - The City of Windsor's Ability to Pay Experience**<sup>10</sup>

Consider the recent case involving the City of Windsor and the Windsor Professional Fire Fighters Association. In that case the City presented the arbitrator with an extensive and forceful ability to pay argument based on real evidence and real statistics that the Fire Association was free to refute.

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<sup>10</sup> City of Windsor Fire Arbitration Award Ability to Pay presentation at ESSC Labour Forum June 2010



The City presented the following Economic Indicators:

- ▶ is the 10<sup>th</sup> decile among comparator municipalities in terms of poorest fiscal health with respect to costs per household (Ontario FIR);
- ▶ Unemployment rates in January 2009 ranging from low- Regina of 3.2% to high of Windsor 10.9%. Comparator municipalities ranged from 7.8% (London) to 8.8% (St. Catherine); and
- ▶ Local private sector data indicating that 11 companies where between 30 and 1400 employees per company were affected, with either layoff or closure- 3500 employees just in this list of recent impacts

The City presented the following Taxation/ Revenue Indicators:

- ▶ As of 2008, Windsor's Current Value Assessment (CVA) had dropped 4.98% from the report CVA in 2005;
- ▶ 53% of the City's revenue was generated by residential taxes;
- ▶ Windsor was the only municipality in the relevant comparator group to suffer a decline in residential CVA;; and
- ▶ The City's largest taxpayer was the Casino who, from 2008 to 2009 experienced a decrease in taxes of 53.66%

The other Financial Indicators that the City relied upon included:

- ▶ A 62.4% reduction of total construction value from 2005 to 2008;
- ▶ The Lowest end of year reserve balance as a percentage of its operating fund expenditure (12.8% versus comparator average of 86.4%);
- ▶ The highest cost of firefighting per household . (schedule 40- FIR); and
- ▶ The fact that none of the comparator municipalities had more firefighters per 1000 households than Windsor (Windsor had 21.43% more than average)

The City presented the following information with respect to the extent to which services may be reduced in light of the arbitration award:

- ▶ City budget increases were less than 1% for past 4 years (2006 to 2010);
- ▶ 2010 levy = \$312.5 million versus 2008 = \$314.3 million (excluding education);
- ▶ Fire reductions were less than average over past years (versus other departments);
- ▶ Re-allocating resources to pay for the WPPFA's proposals would not be fair to citizens who are paying over 50% more per household for fire services than the average comparator ; and
- ▶ Comparison of wage increases of other employers in Windsor

The arbitration board recognized the fact that the evidence demonstrated that Windsor had been particularly hard hit by the current economic recession. Therefore, there was an explicit acknowledgement that the local conditions were such that, in theory at least, the comparison to other municipalities should be tempered at a minimum. However, the arbitration board proceeded to award the WPPFA parity with police for 2006 -2009 at just over 3% per annum, which still exceeded the wage adjustments of other employers in Windsor.

## Case #2 - The Region of Niagara Police Ability to Pay Experience <sup>11</sup>

In the Region of Niagara, Council recently adopted a strategy that any property tax increase will be less than taxpayer household income growth. This is viewed as sound public policy as Niagara taxpayers pay relatively higher percentages of their incomes on property taxes due to a lower standard of living than that of many other regions in Ontario.

For the past five years, Niagara Regional Council has established its budget guidelines on affordability and sustainability. The operating principle is ~~to~~ spend no more than the taxpayer can afford. This means that regional property tax increase should be less than household income growth.

Economic Indicators presented by the Region included:

- ▶ Average household income in 2010 in Niagara is \$73,900 vs. \$87,800 in the whole of Ontario ;
- ▶ The percentage increase in average annual household income in Niagara is 0.4%;
- ▶ The average household income in Ontario dropped -.9% in 2010;
- ▶ Freely negotiated wage settlements are dropping while arbitrated settlements continue to rise.

On July 26, 2010, Arbitrator George W. Adams rendered his decision in the Region's collective bargaining dispute with its police officers without providing any explanation as to why he did not address the evidence of Niagara's poor economic state compared to other municipalities. In addition, he awarded a 10% wage increase over 3 years (with 3.25% awarded for 2011, the year of restraint according to government policy statements) and substantial increases in benefits. It is estimated that the arbitrated award for Niagara Police will consume 54% of the funding envelope for all groups funded under Niagara Regional Council. Niagara Region wrote Minister Fonseca, Minister of Labour at that time, to express the view that interest arbitration awards do not fully consider affordability for municipal taxpayers or municipal council's direction for the municipality.

The trend towards the lack of full consideration of (and arguably the complete disregard for) the ability to pay is also expanding into awards for non-uniform police personnel. Recently in the City of Pembroke, Arbitrator Dr. William A. Marcotte issued an award <sup>12</sup> that will see increased costs to the municipality of \$392,497 for the three year period between January 2009 and December 2011 for dispatchers, secretary and clerk typists, and special constables. Arbitrator Marcotte did not outline any consideration of the strong arguments put forth by the employer to indicate its inability to pay for a 22 percent salary increase. It is expected this will result in a ripple effect when the uniformed officers' contract comes up in 2012.

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<sup>11</sup> Niagara Region "The Gateway to Open Ontario" presentation to Minister Fonseca, May, 2010

<sup>12</sup> City of Pembroke, Pembroke Police Association (Civilian Members), retrieved November 2010 from <http://www.policearbitration.on.ca/content/stellent/groups/public/@abcs/@www/@opac/documents/awards/10-014.pdf>

What is most interesting to note, is that the ability to pay and the economic situation in the municipality arguments have been considered by arbitrators/arbitration boards in the past. In the 1997 Niagara Police Services award, Arbitrator Richard Jackson actually addressed each of the criteria and provided explanations for his decisions.

So what has changed since then? Why is it that most arbitrators/arbitration boards continue to apply the ability to pay criteria without regard for the economic situation in the local municipality and in Ontario? Why do they appear to believe these factors are not relevant for their consideration, even though they have a legal responsibility to consider them?

*“Arbitrators are fiercely independent, so in the Mike Harris years the government tried to tie their hands with legislation requiring them to take account of the employer’s “ability to pay”. Arbitrators effectively circumvented that legislation by finding that governments have an infinite ability to pay by raising taxes or running deficits. (Toronto Star Editorial . November 11, 2010)*

### **Arbitration Awards Devoid of Rationale**

Many arbitration awards are devoid of any significant explanation of the rationale for the award. Arbitrators are generally reluctant to provide a detailed analysis in interest arbitration awards. This leaves the impression that certain criteria were not considered or were not given full consideration.

In order to ensure that the ability to pay criteria is applied in a meaningful way, arbitrators should be required to demonstrate that they have done so.

### **No “Free” Collective Bargaining**

From an employer’s perspective, there is no longer any truly free collective bargaining in the emergency services sectors that is bound by interest arbitration. The introduction of statutory criteria governing interest arbitration was intended to ensure that factors such as ability to pay were applied. The failure by arbitrators to respect and apply such criteria has left public sector employers at a disadvantage and the resulting settlements and awards create significant fiscal pressures for these employers and the taxpayers they serve. As a result, arbitrators possess the power to make determinations that have a direct impact on municipal and provincial budgets yet they have no accountability for this decision-making power.

## **#4. Recommended Criteria to Determine Ability to Pay**

Labour-management relationships and partnerships are intended to be based on trust, mutual respect, open communication, bilateral consensual problem solving, and shared accountability. Arbitrators must be asked to act responsibly and carry some of the accountability to curb rising emergency services labour costs where the appropriate information and data has been provided for them to do so. It is the Employer’s position that appropriate criteria for fair decisions must be expanded as one way to enable this to happen.

The solution to this problem cannot be definitively stated. However, outlined below are the ESSC's stated areas for change which, if adopted and enforced, would lead to the change which is required. There may be additional areas and the stated areas below may need revision prior to implementation, but this is reflective of the ESSC's understanding of the landscape as it exists at this point in time.

Accordingly, Arbitrators should:

- fully and equally consider the legislative criteria already in place, particularly the employer's ability to pay in light of its fiscal situation and the economic situation in both the local community and the Province
- apply economic indicator tests to determine the local economic realities and the taxpayer's ability to pay for any proposed award (stating the expected evidence required will assist both the immediate parties to the dispute and other parties in their preparation for bargaining and/or interest arbitration);
- demonstrate that due consideration was given for each legislated criterion when rendering decisions;
- consider the financial impact of settlements on the municipality and on the wage structure in other programs/services within the municipality;
- consider not only comparisons to other emergency services workers within the community and other areas, but also comparisons to other unionized and non-unionized employees in the same community
- follow what has been agreed to in freely negotiated settlements as opposed to creating the trends, or applying the replication of perceived bargaining trends;
- consider, and evaluate the evidence provided, regarding the level to which municipal services might have to be reduced to implement the decision if current funding and taxation levels are not increased;
- be consistent with the municipal council's service priorities as this is within the mandate of municipal council (i.e. do not render decisions that jeopardize the municipality's ability to determine and set these priorities);
- require arbitrators/arbitration boards to take into consideration the total compensation costing of the entire settlement (wages and benefits) including present value of future liabilities (i.e. full actuarial cost of retention pay, supplemental pension benefits, etc.; and
- consider the policy direction of the Province on frozen transfer payments and wage restraint

In addition to ensuring that arbitrators/arbitration boards consider all legislated criteria, the ESSC would suggest the application of the following Local Economic Indicator tests to determine the community's and its taxpayers' ability to pay. For example, the types of criteria that should be considered are as follows:

- a) Changes in tax revenue . i.e. increased costs, significant decrease in revenues and an inability to raise additional funding . the focal point should be long term difficulties rather than a single year of hardship;
- b) Detailed analysis of the impact of decisions on residents as a whole. Take into account local incomes (average family and single incomes), average taxes, government transfer payments, (employment based income vs. transfer payments) and ration of social assistance compared to overall population. Also, consider the demographic of taxpayers . population, age of population, population working vs. unemployed, retired population and population on fixed income;
- c) Increased capital costs, infrastructure cost increases, depletion of capital assets and essential replacement costs that affect a municipality's ability to fund employee compensation packages;
- d) Housing . assessment growth, value of building permits, development charges, housing stock, rental vacancies and subsidized housing wait lists, etc.;
- e) Community economic indicators . layoffs, loss of employment in the municipality affecting the taxpayers' ability to pay (including full time jobs replaced by part time lower paying jobs), business closures, and discouraged+worker adjustment;
- f) Layoffs or cutbacks in other areas of public service, and comparison between emergency services and other municipal groups/employees within that municipality of the terms of employment and the nature of work;
- g) Significant pressure on other budget priorities;
- h) Status of the municipality's reserve funds . is this really available money?;
- i) Comparison with comparator municipalities in terms of fiscal health, percentage of emergency services per capita, labour costs of emergency services per household (i.e. tax write offs and foreclosures)
- j) Economic situation in Ontario and in the municipality including private sector settlements
- k) Ability to attract and retain emergency services personnel

The ESSC recognizes that arbitrators and arbitration boards can only base their decisions on the information and data that is provided. Accordingly, we are not asking that arguments which are not properly supported by evidence be endorsed by the arbitrator or arbitration board. It is incumbent on the municipality who is advancing these arguments to provide the necessary data (in line with those factors and considerations set out above) to support its position in this regard. However, the ESSC is asking that when that happens that some assurance that it will be properly and fairly evaluated needs to be evident.

It is the Employer's position that assistance from the Province is needed to bring about these changes so that the escalating labour costs associated with emergency services are brought in line with other municipal services. We believe that the changes outlined above would ensure that awards are fair, balanced and consistent with the real costs of implementation. We believe that changes are required to ensure that the statutorily prescribed criteria are reflected in all interest arbitration decisions.

## Summary

The gap between emergency services salaries and the salaries of other professionals, including municipal service workers, continues to widen with no end in sight. We recognize that these costs are a function of both negotiated settlements and arbitration awards, but it is the Employer's position that the negotiated settlements are not in effect freely bargained+in that the dissatisfaction with the interest arbitration process, and the perceived inequities in the present system, have led many municipalities to conclude that change is not possible at arbitration and they cannot sacrifice the precious resources available to engage in the interest arbitration process when there is no reasonable prospect of a better result (at least to date).

In effect, many municipalities believe that they are being placed between two impossible positions (achieving a fiscally responsible agreement through bargaining or through interest arbitration under the current system) and therefore they have no alternative but to reduce the costs and uncertainty of arbitration by entering into negotiated settlements.

Should this trend be allowed to continue, funds for emergency services salaries, which are by far the largest component of emergency services budgets, will have to come from increased taxes or reductions in key services such as transportation, public works, housing, etc. These increased emergency services labour costs are simply no longer sustainable.

Arbitrators/arbitration boards must start giving due consideration to each of the legislated criteria, including the municipality's and its taxpayers' ability to pay as a result of the local and Ontario economies, and demonstrating such consideration in their awards. Employers need to be provided with recourse to legislation that contains unrealistic emergency services costs and puts the interests of taxpayers and their municipalities first. The Province should seek to address the inequities (real or perceived) in the current arbitration system to ensure fairer treatment for municipalities and the residents they serve and to rebalance+the playing field. Awards should reflect the free collective

bargaining process across all sectors, and comparisons to other union and non union employees within the same community are imperative.

In March 2009, Premier Dalton McGuinty asked municipalities and police services boards to show restraint in their spending on wages and benefits so as to address the economic downturn. There was to be renewed provincial pressure with implementation of the *Public Sector Compensation Restraint to Protect Public Service Act, 2010*. Premier McGuinty is urging municipalities to copy his wage freeze, although police and fire employees are not subject to this control. Effectively, municipalities are being asked to impose restraint on some public employees while others drawing from the same diminishing funds are not restrained.

The Premier has said, *“It means that folks running our cities... all have a responsibility to come together, sit down and deal with it”*. When asked if that was a message to unions or to management, he responded, *“It’s a message to all.”* Through the work of the ESSC on behalf of its stakeholders, it is clear that the municipalities in Ontario want to sit down and deal with the economic realities of the workplace and the community. At this time, however, the perceived imbalance is simply too great for municipalities to overcome without assistance.

Furthermore, arbitrators (Sunnybrook Health Sciences Centre award dated August 19, 2010, the Participating Nursing Homes award dated September 15, 2010 and the University of Toronto Faculty Assoc. award dated October 5, 2010), have shown their disregard for the Province’s message based on a strictly legal analysis without consideration of the merits of the message. As these arbitrators’ decisions are now affecting the provincial government’s ability to pay, perhaps the Province is in a better position to understand the struggles municipalities have had for years with the arbitration system. Perhaps now is the most appropriate timing for the two levels of government to work together to resolve this issue.

We submit that the Province is in an essential position to enable municipal employers and associations to reach and maintain cost efficient collective agreements. In fact, it is apparent to the ESSC that change cannot be made with respect to these issues without the involvement of the Province and the recognition that there is a problem that needs to be fixed by everyone involved.

***Furthermore, Ontario now faces the prospect of two tiers of public sector workers – those with their wages frozen by legislation and those who will continue receiving pay hikes. That is both unfair and unsustainable. The government has to find a better way.*** (Toronto Star Editorial . Province Needs New Approach . November 11, 2010 <sup>13</sup>

<sup>13</sup> Toronto Star Editorial . *Province Needs New Approach*; retrieved November 11, 2010 from <http://www.thestar.com/opinion/editorials/article/888827--arbitration-ruling-province-needs-new-approach>

## **Conclusion**

The joint LUMCO/MARCO/OAPSB Emergency Services Steering Committee (ESSC) supports the positions put forth by other Ontario municipalities (i.e. Niagara Region and the Eastern Ontario Mayors' Committee), to the Ontario Minister of Labour, the Honourable Charles Sousa, on the ability to pay and needed changes to the arbitration system. It is our collective resolve to request that the Government of Ontario revise and tighten legislative criteria so as to force arbitrators and arbitration boards to be more accountable for their decisions so that awards are fair and balanced for both parties.

## **Additional References**

1. Mason, Mark H, "*Collective Bargaining Dispute Resolution in Ontario*. (June, 2009)
2. Wilson, Matthew R. and Mason, Mark H., "*The Interest Arbitration Process in Emergency Services*", (June, 2010)