ESSENTIAL SERVICES CONSULTATION – WHAT WE HEARD

OVERVIEW OF THE CONSULTATION PROCESS

In January 2015, the Supreme Court of Canada released its decision in *Saskatchewan Federation of Labour v. Saskatchewan* (SFL decision). In this decision the Supreme Court of Canada found that the right to strike is fundamental to the collective bargaining process and is constitutionally protected under section 2(d) (Freedom of Association) of the *Canadian Charter of Rights and Freedoms* (Charter).

In the SFL decision, the Supreme Court of Canada asserted that an employee's right to withdraw labour when collective bargaining negotiations break down is critical to a meaningful process of collective bargaining. However, the Court also said that many employees in the public sector provide essential services and the maintenance of these essential public services during a work stoppage is a proper concern for governments and public sector employers, so long as legislative restrictions do not substantially interfere with meaningful collective bargaining. In the wake of this decision, Alberta's Court of Queen's Bench found that the prohibitions against strikes under the *Labour Relations Code* (Code) and the *Public Service Employee Relations Act* (PSERA) were in violation of the Charter. Alberta was given until March 31, 2015 to introduce remedial legislation.

On September 16, 2015, Jobs, Skills, Training and Labour (JSTL) initiated a focused consultation process to gather feedback around an alternative approach to dispute resolution for those parts of the broad public sector subject to compulsory arbitration and not permitted to strike and lockout. The consultation was centered on an "essential services" model of dispute resolution, which permits work stoppages subject to the continued provision of essential levels of public services.

JSTL solicited feedback to discussion questions in the "Essential Services Discussion Guide" (attached) and accepted written responses until December 1, 2015. JSTL received and reviewed 53 written submissions, representing approximately 90 different organizations including unions, public sector employers and other interested organizations (list of submissions in Appendix A). JSTL also held ten sectorial-based roundtable discussions, facilitated by Mr. Andrew Sims, Q.C., which involved union and employer representatives from 35 different organizations. A note-taker from JSTL was present at all roundtable discussions.

In addition, there was a website portal where the public could submit comments regarding essential services legislation. During the public consultation period of September 16 to October 31, 2015, 106 comments were submitted through the website portal. The majority of the public comments provided opinions on whether or not public sector workers should have a right to strike, with a strong majority favouring a right to strike provided that essential services are maintained.

The following are the broadly categorized sectors that provided input to the consultation process (with both union and employer representation):

- Health care, including acute care, private and non-profit continuing care, emergency medical services and laboratory services;
- Provincial government services, including agencies, boards and commissions;
- Post-secondary education;
- Municipally operated police and fire services; and
- Other municipal services and utilities.

The following sections provide a brief thematic overview of the feedback JSTL received in response to the Essential Services Discussion Guide, based on a review of both the written submissions and notes taken from the roundtable discussions. Each theme below addresses issues directly raised in the Discussion Guide.

Note: In conjunction with JSTL's Essential Services Consultation, Advanced Education conducted a consultation with post-secondary institutions, faculty associations and graduate student associations. The collective bargaining process for these parties is established in the Post Secondary Learning Act *(PSLA) and generally requires collective bargaining disputes to be resolved through compulsory arbitration instead of strikes and lockouts. While the consultation processes were generally aligned, Advanced Education is reporting separately on the results of the PSLA consultation.*

SCOPE AND APPLICATION OF ESSENTIAL SERVICES LEGISLATION[1]

The essential services consultation generally focused on the components of the broad public sector that are currently prohibited from strikes and lockouts under the Code, PSERA and the *Police Officers Collective Bargaining Act* (POCBA).

Unions and the municipal employers of fire fighters and police officers all argued that fire and police services are critical to protect the life, health and safety of the population. These participants unanimously agreed that all fire fighters and police officers are essential and a full prohibition on the right to strike is justifiable. They expressed a strong preference to maintain the existing legislative prohibitions on strikes and lockouts and the requirement for disputes to be settled through a process of compulsory arbitration.

Elsewhere within the broader public sector, there was general consensus that essential services legislation would be an appropriate fit for the health care sector and provincial government services (i.e., the Alberta Public Service). However, there was some disagreement among the unions and employers regarding whether essential services legislation should also apply to the non-academic employees at public post-secondary institutions and the employees of unionized provincial agencies, boards and commissions. Many of the unions representing these employees indicated the services provided should not be considered "essential" at all and therefore all of the non-academic employees at public post-secondary institutions and the employees of unionized provincial agencies, boards and commissions should have an unfettered right to strike and employers should have the corollary right to lock out. Some employers were in agreement that their employees could be subject to an unfettered right to strike and lockout (e.g. some agencies,

[1] Essential Services Discussion Guide Question 1

boards and commissions); however most employers indicated that at least some of the services they provide should be considered essential services and the application of essential services legislation would be appropriate.

Some of the written submissions and roundtable discussions also touched on the issue of whether essential services legislation should extend to certain unionized workplaces that may in fact provide essential-like services, but already enjoy an unfettered right to strike and lockout under the Code. These discussions primarily focused around bargaining units within privately operated medical laboratories (including Canadian Blood Services), continuing care facilities and municipal services that are ancillary to police and fire services (e.g., 9-1-1 dispatch operators). Some municipal employers argued that certain private and municipal utilities, such as water treatment, water distribution and power generation, are also services that could potentially be considered "essential".

Generally, the extension of essential services legislation to services such as laboratories, continuing care facilities and municipal works was supported by the affected employers. However, the impacted unions argued that the current essential services review should not result in further restrictions on the right to strike for employees but should only deal with relieving the prohibitions on strikes that are already in place and that had been found to be unconstitutional by the Supreme Court of Canada and the Alberta Court of Queen's Bench. Some of these unions went so far to say that they may challenge the constitutionality of the legislation if they believe it places any unnecessary restrictions on the right to strike.

The discussions around "fettering" the right to strike for certain organizations also involved discussions around the future status of the Disputes Inquiry Board (DIB) and the Public Emergency Tribunal (PET), which are existing tools in the Code that government can use to restrict a work stoppage if there is a perceived threat to the public (in the case of a PET) or if government perceives that there is a reasonable opportunity for the parties to reach a negotiated agreement (in the case of a DIB). Generally speaking, most participants favoured the continued use of these tools; however, there was some acknowledgement that provisions may be overly restrictive when used to delay (in the case of a DIB) or altogether preclude (in the case of a PET) a strike or lockout.

DEFINITION OF "ESSENTIAL SERVICES"[2]

Most participants agreed that the definition of "essential services" will be a crucial feature of Alberta's essential services model. However, at the same time, the participants recognized that the definition has the potential to be the subject of a great deal of confusion and litigation. Almost all participants indicated a preference to have some kind of legislated definition of "essential services", rather than let the definition emerge through time via jurisprudence. The participants felt that not having a definition of essential services would cause confusion and likely to lead to increased litigation. Likewise, there was general agreement that a legislated definition would, to a large extent, positively set out the scope of services covered by the essential services process; provide the framework for employers and unions to negotiate the services to be provided in the event of a strike or lockout; and provide guidance to the adjudicative body that is tasked with resolving disputes around essential services.

[2] Essential Services Discussion Guide Question 2

The following definitions from other jurisdictions were commonly cited in responses from unions:

International Labour Organization Committee on Freedom of Association

> "Services the interruption of which would endanger the life, personal safety or health of the whole or part of the population."

Ontario Crown Employees Collective Bargaining Act

> "essential services" means services that are necessary to enable the employer to prevent,
>
> (a) danger to life, health or safety,
> (b) the destruction or serious deterioration of machinery, equipment or premises,
> (c) serious environmental damage, or
> (d) disruption of the administration of the courts or of legislative drafting;

British Columbia's approach to defining essential services was commonly cited in responses from employers:

British Columbia Labour Relations Code

> 72 (1) If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute,
>
> (a) investigate whether or not the dispute poses a threat to
>
> (i) the health, safety or welfare of the residents of British Columbia, or
>
> (ii) the provision of educational programs to students and eligible children under the *School Act*, and
>
> (b) report the results of the investigation to the minister.

A number of employers argued that the definition should be broad enough to capture all of the services that may legitimately be essential. Many of these employers argued that the definition should incorporate serious environmental and property damage, but many also suggested detailed definitions based on the unique nature of their operations. However, many of the unions submitted that the definition needs to narrowly capture services that are required to protect the life, health and safety of the public and that the legislated definition should not serve to restrict the right to strike any more than is necessary to provide these services.

ESSENTIAL SERVICES AGREEMENTS[3]

CONTENTS

There was no dispute that unions and employers will have to create some kind of "essential services agreement" to address how essential services will be provided in the event of a strike or lockout. The following points outline some of the common suggestions regarding the legislated framework for the contents of these essential services agreements:

- Essential services agreements should identify the essential services to be provided by job function and not by individual employees.
- An essential services agreement should set out the manner in which the essential services will be provided during the work stoppage (that is, which party is responsible for assigning essential services work).
- Dispute resolution processes for reaching essential services agreements should be found within the agreements themselves. Most felt that the first step in creating the essential services agreement could be for the union and the employer to nominate members and/or agree to the chair of the essential services dispute resolution tribunal, in whatever form it would take. They preferred this to having a legislated process that would establish the tribunal responsible for resolving the disputes related to the negotiation of an essential services agreement.
- Most participants agreed it would be reasonable to require parties to consider the availability of capable and qualified non-bargaining unit staff (i.e., management and excluded employees) when specifying the essential services to provided.

While some of the above proposed contents for essential services agreements were widely agreed to, many of the participants were of the opinion that the legislation does not need to formally specify these requirements. Some contributors indicated they have sophisticated bargaining relationships and thus they should not be overly restricted by legislative requirements for essential services agreements. They felt a minimalist approach to the legislative requirements for essential services agreements would allow for some flexibility for employers and unions to negotiate essential services agreements that are appropriate for their particular circumstances. For example, the contents within an essential services agreement for a bargaining unit of 50 employees at a single institution could be substantially different than the contents of an essential services agreement for a province-wide bargaining unit of 20,000 employees.

PROCESS

The majority of the participants indicated that the process for developing an essential services agreement should be a collaborative process between the union and the employer where both parties to attempt good faith negotiations to reach an essential services agreement. However, these participants acknowledged that there may be occasions when it is difficult to reach a negotiated essential services agreement and that there should be a mechanism for adjudicating disputes.

[3] Essential Services Discussion Guide Questions 3, 4, 5, 7, 8, 9 and 11

Most participants were supportive of a legislative approach requiring the employer to initiate the process of essential services negotiations. However, participants were generally more concerned about the legislated timelines for negotiating essential services agreements than the requirement for one party to initiate the process.

TIMELINE

The majority of the participants indicated there should be legislated timelines for the negotiation of essential services agreement. However, there were diverse views regarding how these timelines should align with the existing legislated timelines for the collective bargaining process.

For example, many of the participants (both union and employer) prefer a legislated requirement for essential services agreements to be concluded before collective bargaining begins. These participants indicated the negotiation of essential services agreements must be completely separate from the collective bargaining cycle. Many of these participants also indicated that it is an important part of collective bargaining for parties to know what the final collective bargaining dispute resolution process will involve and that the only way to know what will be the final collective bargaining dispute resolution process is to have a finalized essential services agreement in place before collective bargaining begins.

Other participants argued that the essential services agreement should be addressed when parties go to mediation for the collective agreement. Under this approach, parties are not required to spend time creating an essential services agreement until collective bargaining reaches impasse. The first task of the parties, once they apply for collective bargaining mediation, would be to address the essential services agreement. The mediator can help parties reach an essential services agreement if they cannot agree and the mediator cannot address collective bargaining matters until the essential services agreement is settled.

A somewhat less common view was that the only legislated timeline requirement should be that an essential services agreement must be in place before a strike or lockout can commence. Under this approach, parties would have the flexibility to negotiate an essential services agreement whenever they deem it to be appropriate.

The proposal to negotiate an essential services agreement before starting collective bargaining seemed to be favoured by many of the employers and unions involved with the large, province-wide bargaining units and those that would be involved in multiple collective bargaining tables; while the proposal to negotiate an essential services agreement once the parties have reached impasse seemed to be favoured by employers that negotiate with smaller, locally organized bargaining units.

DISPUTE RESOLUTION

There was general consensus that the legislation needs to provide a process for resolving disputes over the negotiation of essential services agreements and for resolving disputes over the application of essential services agreements.

In written submissions, the majority of the participants favoured the Alberta Labour Relations Board (LRB) as the adjudicative body and indicated that the LRB would need to be appropriately

resourced for the additional responsibility of adjudicating and administering the essential services process.

However, at the roundtables, participants tended to express a preference for a tribunal approach, where parties can choose members to sit on a panel with a neutral chair. Although, some participants expressed concerns with potential cost to parties under the tribunal approach (e.g., paying tribunal members for lengthy disputes about essential services agreements for some of the province-wide bargaining units in health care and government services); and concerns with the capacity and resourcing of Alberta's current mediation and arbitration rosters. Since the mediators and arbitrators are already occupied with collective bargaining mediations and arbitrations, the participants recognized that Alberta may need to build capacity on these rosters for essential services disputes.

At the roundtable discussions, the facilitator, Mr. Sims, was able to build some consensus around a two-tiered adjudication process: the legislation could establish an "Essential Services Commissioner" (which could be an arm of the LRB) with general oversight responsibility for essential services disputes, but the parties could also choose to establish a tribunal to resolve disputes about their essential services agreement.

Although Mr. Sims' suggested process was not entirely aligned with the suggested dispute resolution processes in the written submissions, participants in the roundtable discussions generally expressed support for Mr. Sims' suggested approach.

A common concern about adjudication was that, whatever the adjudicative body, Alberta lacks the resources and experience to address essential services disputes. Most indicated that government needs to ensure that the adjudicative body is appropriately resourced for the work. Some unions were also concerned that the timelines for resolving disputes over essential services agreements would cause further delay to/restriction on their members' ability to exercise their right to strike.

Additionally, regardless of the adjudicative body, the majority of participants indicated a preference for the voluntary use of mediation prior to adjudication of disputes over essential services agreements. The participants indicated that a legislated requirement to use mediation prior to adjudication could lead to delays in concluding essential services agreements and, generally speaking, parties could use their own discretion to determine when to solicit the assistance of a mediator or could choose to establish a process of mediation within their essential services agreement.

DURATION

There was some debate among the participants about whether an essential services agreement should be ongoing until a formal notice is served to terminate the agreement or if it should automatically terminate once a new collective agreement has been reached.

Many employers and unions were of the opinion that an essential services agreement should automatically terminate once a new collective agreement is reached; however, the participants generally acknowledged that most parties will use the last essential services agreement as a starting point for negotiating the next one.

Some participants felt the process would be more straightforward if essential services agreements were continuous, but amendable upon notice during the collective bargaining process. However, some of the unions were concerned that if the agreements are ongoing, the onus would be on whoever is seeking an amendment to justify why the amendment is necessary. These unions argued that the onus should always be on the employer to justify any designation of essential services that places restrictions on the right to strike.

Overall, most participants did not have strong opinions regarding whether an essential services agreement should be ongoing or whether it should automatically terminate. Other than the issue of onus, there did not seem to be a great distinction between the concept of amending an ongoing agreement between collective bargaining cycles or using the "old" essential services agreement as the starting point for negotiating an essential services agreement for each collective bargaining cycle.

MEANINGFUL COLLECTIVE BARGAINING[4]

Most participants agreed that there should be a method to determine whether the requirement to provide essential services during a strike or lockout is impairing meaningful collective bargaining. These participants also agreed that, when collective bargaining is deemed to be impaired, compulsory arbitration should be used as the final means to settle the collective bargaining dispute. There was also general agreement that voluntary arbitration should always be an option for parties that are subject to essential services legislation.

There was some disagreement about how to determine whether the collective bargaining process is substantially impaired and, as such, instead subject to compulsory arbitration. Some unions strongly asserted that it is only appropriate for the union itself to make a determination as to whether collective bargaining would be impaired by an essential services strike. However, the majority of participants indicated that the essential services adjudicative body (e.g., a tribunal, the Commissioner or the LRB) should be able to receive applications and make a determination about whether collective bargaining would be substantially impaired and order the parties to a compulsory arbitration board to settle the collective agreement.

There was some concern that essential services levels could change in the midst of a strike or lockout such that the collective bargaining process would become substantially impaired. These participants indicated that there should be an ability to bring forward an application to determine whether the strike is substantially impaired when the essential services agreement is first negotiated and anytime amendments or changes are made to the levels of essential services required. Some employers were concerned that a union could then try to apply for this determination if they were not "winning" the strike.

There was very little traction around the concept of an automatic trigger for compulsory arbitration once an essential services agreement requires a specified threshold of employees (as an example, more than 80 per cent of the bargaining unit) to work during a strike or lockout.

[4] Essential Services Discussion Guide Questions 14 and 15

COMPULSORY ARBITRATION

Corresponding with strike and lockout prohibitions in the Code, PSERA and POCBA, these statutes contain compulsory arbitration processes. Overall, the compulsory arbitration processes are similar; however there are some variances from statute to statute. As government sought feedback on removing strike and lockout prohibitions in these statutes, the Essential Services Discussion Guide also asked participants whether the existing compulsory arbitration processes should be replaced with one common compulsory arbitration process that would align with the essential services process and the determination regarding whether collective bargaining would be impaired by an essential services strike or lockout.

A significant proportion of participating employers, as well as most of the unions in police and fire services, indicated a preference for retaining the existing compulsory arbitration provisions in each statute. Most other participating unions (i.e., those subject to the Code and PSERA) indicated a preference for a unified compulsory arbitration process for all parties subject to essential services legislation.

STRIKES AND LOCKOUTS[5]

There was general consensus among participants that, in the event of an essential services strike or lockout, employees who are required to work under the essential services agreement should continue to work under the terms and conditions of the expired collective agreement (i.e., the collective agreement should be "bridged"). Additionally, some of the participant unions indicated the essential services legislation should include provisions that prohibit an employer from altering terms and conditions of employees working during an essential services strike or lockout.

ENFORCEMENT OF ESSENTIAL SERVICES AGREEMENTS[6]

Most participants indicated that the offences and penalties in the legislation are largely irrelevant because the real impetus to comply with the legislation comes from contempt proceedings and civil damages ordered by the courts, which can result in penalties that are much more severe than the fines found in legislation.

Many of the participants proposed that there should be specific offences and penalties related to compliance with an essential services agreement (e.g., prohibition on strikes and lockouts without an essential services agreement in place), but that the monetary value of those penalties should be aligned with existing penalties in the legislation. However, some employers felt the penalties should be higher to reflect the seriousness of non-compliance with an essential services agreement.

There was some discourse around whether the existing dues suspension provisions in the Code and PSERA should apply to illegal strikes under essential services legislation. Some of the participant unions asserted that the dues suspension provisions are tied to the Court of Queen's Bench order that struck down strike prohibitions in the Code and PSERA. These unions indicated that, since the

[5] Essential Services Discussion Guide Question 12
[6] Essential Services Discussion Guide Questions 10 and 13

strike prohibitions were deemed unconstitutional before the courts, the corresponding dues suspension penalties should also be considered unconstitutional.

A few participants expressed concerns related to the crossing of picket lines during a strike or lockout. Some unions argued that bargaining unit members should have the ability to refuse to cross picket lines without being disciplined, even if they have been assigned to work under an essential services agreement. Unions also proposed that employees should not be disciplined if they do not want to cross the picket line of a different bargaining unit that is on strike. On the other hand, these unions also expressed an interest for legislative provisions to prohibit and allow the union to discipline non-essential bargaining unit employees from choosing to cross the picket line and return to work.

There was also some interest in provisions that would allow unions to inspect worksites during an essential services strike or lockout to ensure essential employees are only providing essential services and to ensure worksite safety for essential employees. Employers were not generally supportive of this proposal, as they felt it could be an infringement on management rights.

GOVERNMENT OVERSIGHT

Participants were asked whether there should be a legislated requirement for parties to an essential services agreement to file a copy of a concluded essential services agreement, similar to the existing requirement in the Code to file collective agreements. There was no general consensus among the participants regarding whether essential services agreements should be filed with government or a designated adjudicative body (i.e., the LRB or a tribunal). Some participants indicated that there should be no third-party oversight over essential services agreements; some indicated that oversight by government would help protect the public interest in the event of an essential services strike or lockout; and some participants indicated that oversight by the designated adjudicative body would help facilitate timely dispute resolution.

TRANSITION[7]

There was no general agreement regarding whether essential services legislation should come into force immediately, or whether the legislation should direct that some parties may continue bargaining under the current compulsory arbitration process.

A number of participants - primarily (though not uniformly) unions - indicated that as of April 1, 2016, there is a constitutional right to strike and there is no legal justification to create transition provisions that would delay the implementation of essential services legislation.

For those participants that want transition provisions, most agreed that there should be a designated point in the collective bargaining process where parties who have reached or passed that point would continue bargaining under the “old” rules and parties who had not reached that point would bargain under the “new” rules. There were diverse views on what that point should be.

Many favour an approach such that when essential services legislation comes into force, parties that have commenced collective bargaining can stay under the “old” rules where disputes are

[7] Essential Services Discussion Guide Question 6

resolved through compulsory arbitration. The common rationale provided for this approach was that collective bargaining strategies are created with a view to the dispute resolution process, therefore it would be unfair to change the rules part way through bargaining.

Another popular approach was for parties that have reached impasse in bargaining (are in mediation or have established a compulsory arbitration board) to continue to a compulsory arbitration board. Since these parties are already at impasse, the requirement to negotiate an essential services agreement and take strike or lockout action would likely serve to further delay the resolution of the collective agreement.

Generally speaking, employers' positions related to transitional provisions were also closely tied to their positions regarding the overall application of essential services legislation to their business. For example, employers that indicated their business would not likely involve essential services were more likely to indicate that transitional provisions would not be necessary; while employers that indicated they would be providing essential services were more likely to indicate that transitional provisions are required.

OTHER MATTERS[8]

THE FUTURE OF PSERA

There was general consensus from the employers governed by PSERA that there are still legitimate public policy reasons to keep PSERA and that government's legislative process for essential services should be limited to building an essential services framework into the existing public sector labour relations legislation. These employers argued that, given the time constraints for implementing essential services legislation, it would be more appropriate to review PSERA at a later point, including further consultations.

Some of these employers indicated that the current provisions for non-arbitral matters in PSERA should become matters that parties cannot bargain under an essential services framework. For example, these employers would like to restrict bargaining about the Public Service Pension Plan, which is subject to the *Public Service Pension Plans Act;* and matters related to job evaluation and the selection or appointment of individuals, which is addressed in the *Public Service Act*.

Most of the affected unions took a very different stance on the future of PSERA and argued that the parties covered by PSERA should be moved under the Code and that PSERA should cease to exist. They indicated there is no need for special legislation for the provincial public service; there should not be a different definition of "employee" and exclusions from collective bargaining for public service employees; and the non-arbitral items are no longer relevant since these parties are not likely to end up in arbitration (unless they agree to voluntary arbitration).

REPLACEMENT WORKERS

A number of unions expressed concerns about the potential for employers to hire replacement workers during an essential services dispute. The primary concern was that replacement workers

[8] Essential Services Discussion Guide Question 16

hired to provide any essential or non-essential services would undermine the effect of a strike because there would be less pressure for the employer to try to reach a collective agreement. Unions also asserted that the legislation should prohibit employers from hiring replacement workers in any dispute where unions have agreed to provide essential services. Some employers agreed that they would not be likely to use replacement workers during a dispute because the skills and qualifications of the bargaining unit are not easily replaced (e.g., health care professionals).

Likewise, a few employers used the issue of replacement workers as a rationale for postponing the negotiation of essential services until the parties are at impasse in collective bargaining. The argument provided was that the employer would not be able to make any decisions about how they would operate during a strike or lockout until a time when the work stoppage was imminent – any discussion about the need for bargaining unit employees to provide essential services may depend on the employer's ability to bring in replacement workers for that dispute.

GENERAL COMMENTS

Overall, most participants agreed that it would not be appropriate for Alberta to directly replicate an essential services process already in use in another jurisdiction and that government's approach to essential services should reflect some of the unique aspects of labour relations in Alberta, such as Alberta's province-wide approach to bargaining unit organization for most of the health care sector. The respondents indicated that government will have to consider the potential impact that essential services legislation will have on these bargaining units that are spread across the entire province and introduce an essential services model that will be practicable across Alberta's broad public sector.

Additionally, some participants expressed concerns that most other provinces introduced their essential services legislation prior to the SFL decision. Therefore, these participants indicated that government should be cautious when reviewing legislation from other provinces because those pieces of legislation have not been tested against the criteria that were established in the decision.