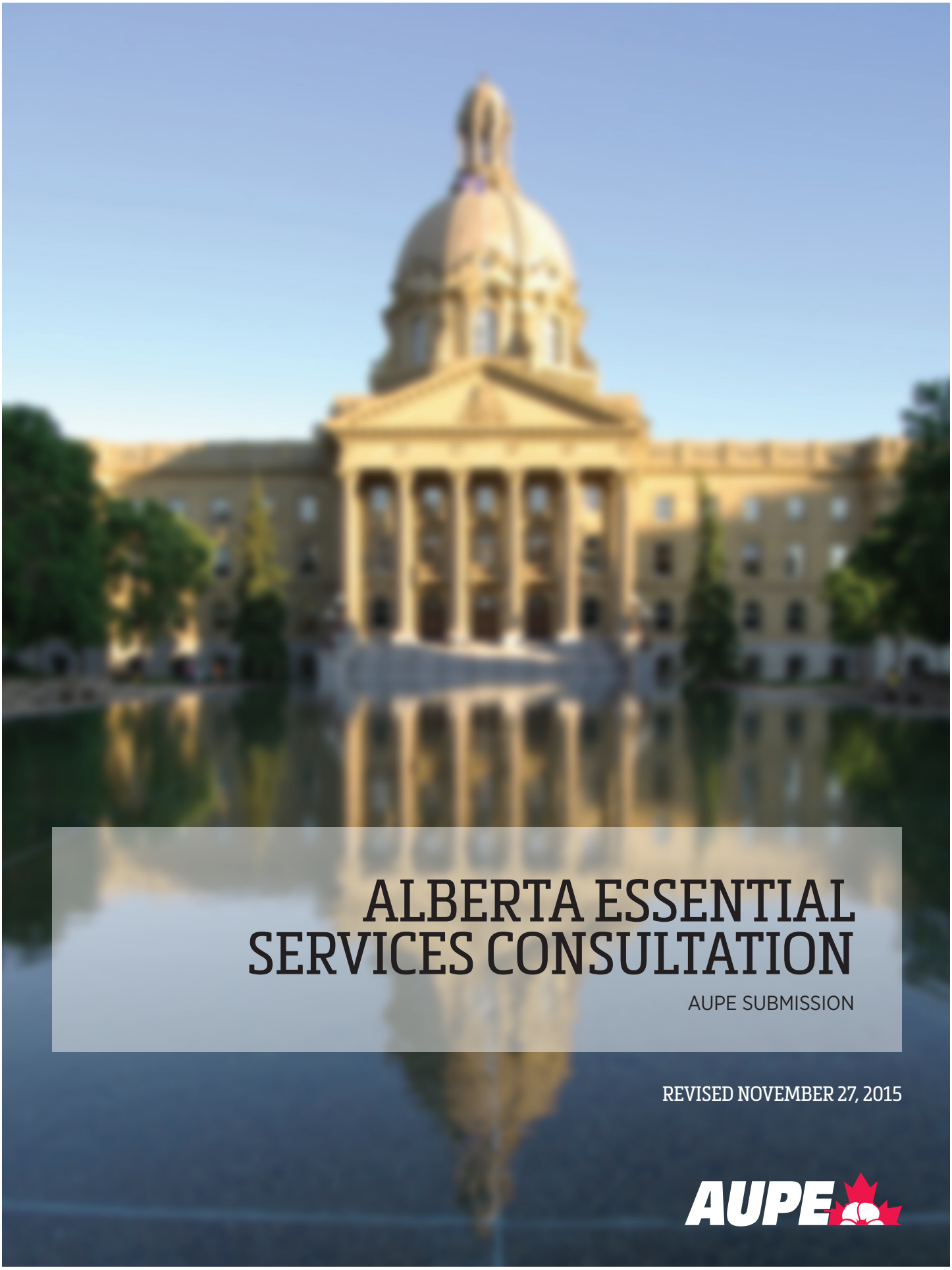

ALBERTA ESSENTIAL SERVICES CONSULTATION

AUPE SUBMISSION

REVISED NOVEMBER 27, 2015

AUPE

INTRODUCTION

The Alberta Union of Provincial Employees is pleased to have this opportunity to participate in the Government of Alberta's consultations on essential services legislation. AUPE members work in almost all parts of the province's public sector, and hence have a vital interest in the content of such labour laws. To be specific, AUPE membership includes significant (or in some cases, majority) groups of employees in the following sectors: Crown Employees, Agencies Boards and Commissions, Health Care, Post-Secondary Education and Continuing Care. At least some of these members will, in all likelihood, be subject to any proposed essential services legislation.

Our approach to the issue of essential services is informed by three premises:

One, the process we are now engaged in is a consequence of the Supreme Court of Canada's judgement in Saskatchewan Federation of Labour v. Saskatchewan, and the judgement of Mr. Justice Thomas in Alberta Court of Queen's Bench striking down section 70 of the Public Service Employee Relations Act and section 96(b) and (c) of the Labour Relations Code. In the SFL judgement, the SCC affirmed that the right to strike is "an essential part of a meaningful collective bargaining process" and hence is constitutionally protected by section 2(d) of the Canadian Charter of Rights and Freedoms. Hence any infringement of that right must be subject to the Oakes test criteria. AUPE believes that, as a result, a survey of existing essential services legislation in Canada should bear in mind that these laws were written and put into effect before the SFL judgement, and that this has potentially important consequences for any such legislation proposed for Alberta.

Essential services legislation attempts to balance the interests of workers and their unions, on the one hand, and public sector employers (and the public), on the other. Before the SFL decision, this process was strictly political, with the resulting laws reflecting governments' philosophies and political views on the role of unions. Certainly there were no constitutional constraints on the balancing process. That will not be the case with any new legislation in Alberta.

This means the application of essential services legislation in Alberta will not be just a legal/technical operation, deciding which positions and workers meet a specified definition of "essential". Instead, the process will be deciding which workers and how many workers lose their Charter right to act in concert with their fellow workers in withdrawing their services to the employer. AUPE submits that this is not just a semantic quibble, but a distinction that will have consequences for both the content and the application of this legislation.

Two, the effect of essential services legislation on labour disputes is asymmetrical. Workers are deprived of their constitutional rights, while employers lose nothing. Further, even workers whose positions are not deemed essential have their rights diminished because they are unable to act in concert with those barred from participating in a strike.

Put simply, while strikes have many functions (communication of dissatisfaction with terms of employment, exercising solidarity, affirming the dignity of workers, and so on), they are fundamentally economic actions. When a strike or lockout occurs, employers and employees are attempting to exert economic pressure on each other. The result, it is presumed, will be a settlement in accordance with labour market realities. In this context, it's clear that every job declared essential diminishes the ability of the workers who are on strike to apply economic pressure.

In fact, since these services are "essential" not just to the public but to the employer, the effect of such declarations is far greater than mere numbers would suggest. Each time a worker is declared to be essential and deprived of the right to strike, the ability of the employer to exert economic pressure on the union and employees increases both relatively and absolutely.

Three, we take it as axiomatic that the provisions of essential services legislation should be written so as to encourage effective collective bargaining.

AUPE'S RESPONSE TO THE DISCUSSION GUIDE – ESSENTIAL SERVICES LEGISLATION FOR ALBERTA'S PUBLIC SECTOR

Given the above, AUPE will respond as clearly as possible to the questions posed in the Government's Discussion Guide. It should be borne in mind, however, that many of the problems involved in drafting and implementing an essential services regime in Alberta will only become apparent as the process unfolds, and that this submission will, of necessity, leave some questions unanswered.

Question 1

Which components/sectors of the public sector do you consider an appropriate "fit" for essential services legislation?

A proper answer to Question 1 will obviously depend on how essential services are defined. As outlined above, AUPE represents workers in five components or sectors of the larger public sector in Alberta – Agencies Boards and Commissions, Continuing Care, Health Care, Crown Employees and Post-Secondary Education. Of these, only Health Care and, possibly some Crown Employees are obvious candidates for essential services legislation. In none of the other sectors would industrial action involve a risk to either the "life, health and safety" of the Alberta public, or a risk of "serious damage to property or the environment."

The Discussion Guide raises the question of whether workers in the Continuing Care sector should be subject to essential services legislation. In response, AUPE would make two observations:

1. The process we are involved in is supposed to be about extending the right to strike, not taking it away from those who already enjoy it, and
2. We do not believe that any of the positions in Continuing Care are "essential" in the sense contemplated by the discussion guide. That is, any threats to patient care can and should be dealt with by either a) the use of existing staff not on strike or, b) the transfer of patients to other facilities.

Only in the event that the Government of Alberta were to establish a legislated bar to the use of replacement workers would the essential services model be appropriate for the Continuing Care sector.

AUPE also suggests that when the Government decides to include a sector within the purview of essential services legislation, there is an absolute onus on the Government to justify this infringement on Charter rights, subject to the Oakes test criteria (a pressing and substantial objective, and proportional means).

Question 2

How should "essential services" be defined? What services meet the definition of being essential?

In previous submissions to the Government, AUPE has proposed the definition of essential services contained in the 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;

We suggest that the above definition is appropriate because of its precision. Other criteria, such as British Columbia's inclusion of the "...welfare of the residents of British Columbia" are overly broad, and their application is unlikely to survive a Charter Challenge. On the other hand, an option suggested in the Discussion Guide ("...do not define – allow the definition to be gradually developed over time through negotiation and third party adjudication...") would, in our view, amount to an invitation to endless litigation.

AUPE also submits that, if there is to be a common definition of essential services (which in practice means essential employees) across the public sector, then there should also be a common definition of "employee" rather than the current differing definitions in the Labour Relations Code and the Public Service Employee Relations Act.

Question 3

Contents of an Essential Services Agreement

An Essential Services Agreement (ESA) is the principal instrument through which this kind of legislation is actually put into effect. AUPE believes that these agreements should be as comprehensive and detailed as possible (although clearly the level of detail that is feasible will vary from sector to sector, and even from one operation or employer to another). The greater specificity in an ESA serves two purposes:

1. it demonstrates that the s. 2(d) rights of the employees declared essential are not being limited in an arbitrary or capricious manner, and
2. it forces the parties (the union and the employer) to seriously consider the actual impact of a work stoppage, thus providing an incentive to bargain a settlement short of impasse.

In any event, it is essential that the ESA require "...the parties to take into consideration the availability of other capable and qualified persons in the employ of the employer (e.g., management and excluded employees)?" Failing to do so would even further erode the ability of the striking employees to exert pressure on the employer.

Question 4

Process for Establishing an Essential Services Agreement

An Essential Services Agreement should be reached through a process of good faith negotiations. Allowing employers to unilaterally set the terms of an ESA, subject only to dispute resolution with a third party would, in the first instance, result in frequent "log jams" in the dispute resolution process. Employers are not necessarily knowledgeable regarding or sensitive to the s. 2(d) rights of their employees, nor can they be expected to apply the provisions of essential services legislation in a nuanced and impartial manner.

Question 5

Under the proposed essential services model, parties would be required to begin negotiating essential services agreements at a specified point in the collective bargaining cycle. How should the process for negotiating essential services agreements align with the collective bargaining/dispute resolution process?

The amount of time required to negotiate an ESA or to achieve an ESA through third party intervention may vary widely depending on the state of the relationship between the parties and the size and complexity of the bargaining unit involved. AUPE suggests that:

1. Such negotiations should begin up to 120 days before the expiration of the collective agreement and, in any event, no later than the date on which notice to bargain is served by either party,
2. The parties be required to conclude an ESA prior to the expiry of the current collective agreement,
3. If the parties have not reached agreement on an ESA on the date the current collective agreement expires, the dispute should be referred to the special tribunal outlined in our response to Question 8,
4. The special tribunal will then have 30 days to produce a final ESA.

Both the negotiations for an ESA and the deliberations of the special tribunal must be guided by the principle that it is the employer that bears the onus to show why any given position/employee should be declared essential and the employee deprived of her or his constitutional right to participate in a strike.

Question 6

What should happen for collective bargaining tables that are already underway by the time essential services legislation comes into force?

AUPE is of the belief that our members currently in bargaining already have the right to strike, and that they are at liberty to exercise that right subject only to limitations deriving from s. 1 of the Charter, and the established jurisprudence on such limitations (the Oakes test). Under these circumstances, we cannot agree that any transitional provisions are necessary.

Question 7

Disputes in the Course of Negotiating an Essential Services Agreement. What should happen if an employer and union cannot agree on the provision of essential services?

This question is closely tied to Questions 4, 5 8 &9. For disputes involving large and complex operations (in health care, for example), some form of mediation will almost certainly be necessary. Such mediation should be available upon the application of either party.

Question 8

If negotiations/mediation for essential services agreement reaches an impasse, a neutral third party/ tribunal could be required to resolve the dispute.

AUPE submits that some such dispute resolution mechanism will be necessary. We further submit that the Labour Relations Board would not be an appropriate mechanism. Some of the determinations to be made by the tribunal may require a significantly detailed knowledge of the sector and the organizations operating within the sector. The Labour Relations Board is not constructed with an eye to such knowledge.

Instead, AUPE proposes a tribunal modeled on existing Compulsory Arbitration Boards. That is, each party would nominate a representative, and the two nominees would then agree on a neutral Chair. This would allow the parties to ensure that the tribunal included members with the requisite knowledge. It would also be appropriate to require the members of this board/tribunal to be named at the time when negotiations to establish an ESA commence, to ensure that the board members will be available when required.

Question 9

Once an Essential Services Agreement is concluded, can it be amended?

The parties should be able to amend the ESA by mutual agreement. Failing that, the tribunal outlined in our answer to Question 8 above should be charged with amending the agreement.

In the opinion of AUPE, this question is closely tied to Question 14, and we will elaborate our response when we address that question.

Question 10

What role should the government play regarding the oversight of the provision of essential services and essential services agreements? Should the parties be required to submit essential services agreements to the government for oversight purposes?

Since the government is a party to these disputes, either directly (in the case of Crown employees) or indirectly (in the case of other public sector workers), AUPE doesn't believe an oversight role for government is appropriate. Instead, a copy of the essential service agreement should be filed with the designated tribunal.

Question 11

Under the proposed essential services model, essential services agreements would be ongoing in nature (roll over through collective bargaining cycles), but could be amended or terminated by notice of either party – however, the legislation would stipulate that agreements cannot be terminated during a strike or lockout. Should essential services agreements be ongoing in nature and should there be provisions that establish a process for termination of these agreements?

AUPE is strongly of the belief that ESAs should not be ongoing in nature. We have three main objections to roll-over agreements.

First, fundamental Charter rights cannot simply be limited in such an arbitrary manner.

Second, organizations change and evolve over time. New structures of work and responsibility are created, and the role of jobs (positions), job titles, classifications and whole organizational units can change. What was essential during the period of one collective agreement may not be during the next. In a large and complex sector with a single employer (health care springs to mind), there could easily be a large number of such changes.

Under these circumstances, a roll-over ESA would not require the parties to negotiate in good faith to determine what services are, in fact, essential. The result would be for one party or another to refer a large number of these issues in dispute to the specialized tribunal, with the very real danger that the tribunal would become overwhelmed by the volume of issues referred.

Third, requiring the parties to negotiate a new ESA in each bargaining cycle would fulfill a real labour relations purpose by requiring them to address the potential impact of a work stoppage (see our response to Question 3). The ESA negotiating process is closely linked to the collective bargaining process, and should work in harmony with the latter.

This doesn't mean the parties need necessarily start from a blank slate. Previous agreements could be used as models or even templates. The essential point is that the parties be compelled to address the exclusions in a serious and conscientious manner.

It should be noted here that "...the legislation would stipulate that agreements cannot be terminated during a strike or lockout..." but Question 3 asserts the possible necessity to amend an ESA "...during a strike or lockout..." generally by adding additional employees or groups of employees to be required to work. This is an example of the asymmetry in the essential services paradigm that we identified in the introduction to this submission.

Question 12

In Alberta, if a strike or lockout occurs, the most recent collective agreement is considered to be no longer bridged. If a strike or lockout occurs within an essential services framework, what should be the terms and conditions of employment for those employees required to work as a result of being deemed to be essential?

AUPE believes that the only effective way to protect the employment rights of workers declared essential is to bridge the collective agreement for these employees.

During a strike or lockout under an essential services framework, stress levels in the workplace increase (this is, in fact, part of the point of a strike). Essential workers (especially those who supported strike action) will be put in an awkward position vis-à-vis their striking peers, they will be experiencing increased workloads and they will be working with and under managers who are themselves highly stressed. In these circumstances there is a significant risk worksite events that could lead to an employee being subject to discipline. Under these circumstances, employees will need prompt access to union representation and the grievance process. We suggest that only a bridged collective agreement can properly provide such access.

Question 13

Legislation could provide for prohibitions against commencing a strike or lockout in the absence of a concluded essential services agreement, or strikes and lockouts in contravention of an essential services agreement. In other jurisdictions, the penalties for violation of these prohibitions is either the same or greater than the general penalties for illegal strikes and lockouts.

AUPE notes that the current penalties for illegal strikes in Alberta are already higher than in most other jurisdictions, and suggests that no additional, higher penalties are required or needed.

Question 14

The proposed model includes an alternative form of dispute resolution (e.g. binding interest arbitration) in the event that meaningful collective bargaining is not possible because the proportion of the workforce required to provide essential services does not allow for a strike to meaningfully affect the collective bargaining process.

Question 14 goes on to propose a statutory automatic trigger to advance a dispute to binding arbitration, and invites respondents to identify an appropriate threshold. AUPE submits that this approach is arbitrary, and unworkable. The point at which the number of workers declared essential renders the strike option unusable will vary from sector to sector, from bargaining unit to bargaining unit, from worksite to worksite and even from one round of collective bargaining to the next. Indeed, it's often not the number of workers designated essential, but which workers (i.e., what parts of the employer's operation) that are barred from striking that determines the practicability of strike action.

At this point it is appropriate to return to an argument advanced by AUPE in the introduction to this submission, regarding the fundamental asymmetry of the essential services framework. The process of declaring certain workers essential has a detrimental effect on the ability of the employees of the employer to carry out a successful strike or to successfully resist an employer lockout. With the caveat cited in the previous paragraph (sometimes it's which workers as much as how many workers that is important), the more employees declared essential, the weaker the bargaining position of the employees and their union.

At what point does the designation of workers as essential impair the bargaining power of the union sufficiently that resort to compulsory interest arbitration is required? AUPE submits that there is only one party that has the knowledge and the right to make that judgment – the union. When the union determines that the designation of staff as essential has compromised the ability of the workers to carry out strike action or to resist a lockout, the union must have the ability to go to the special tribunal and request that a compulsory arbitration be established to resolve the dispute and impose a collective agreement.

We also submit that the employer should have no similar option. Nothing in the essential services framework diminishes the employer's bargaining power in the slightest. On the contrary, every position that is declared essential strengthens the employer's position in two ways:

1. It weakens the ability of the unionized employees to exert pressure on the employer in a strike or lockout, and
2. It increases the ability of the employer to hold out longer in a strike or lockout situation.

So: no detriment to employer bargaining power, no countervailing procedural right to alternative dispute resolution mechanisms.

This mechanism is also the only reasonable response to a situation (as per Question 9) when an ESA is amended during the course of a strike or lockout. When employees who have committed themselves to job action find their bargaining position undermined after they are already on a picket line, they must be able to have recourse to compulsory arbitration; otherwise the amendment of the ESA has the potential to leave them stranded in an unwinnable fight, thanks to the application of government legislation.

Question 15

For those bargaining disputes that may end up in arbitration for the reasons noted above, should there be common compulsory arbitration provisions regardless of the current statute (Labour Relations Code, PSERA or POCBA) governing the bargaining relationship?

AUPE suggests that, if practicable, a common arbitration system consistent with the constitutional rights of the parties would be appropriate.

Question 16

Are there any issues sufficiently unique to the public service that would require different provisions for the matters to be addressed in bargaining or at arbitration (for example, the non arbitrable items listed in section 30 of PSERA)?

AUPE has always been of the view and remains convinced that section 30 of PSERA is unconstitutional and should be deleted from the PSERA as part of this legislative review. In particular, we believe that pension issues, including plan benefits and costs, are properly dealt with through a reformed pension governance system independent of government that, for example, assigns plan design (benefit) issues to a sponsor board consisting of employers and employees. Such a governance system would also include a fiduciary board that has responsibility for administering the plan and ensuring the security of plan benefits.

AUPE is hopeful that discussions will soon begin with Alberta Treasury Board and Finance and with Public Service Pension Plan employers with a view to creating such a governance system for the PSPP.

CONCLUSION

AUPE is pleased to participate in the current legislative review, and looks forward to the legislative recognition of the constitutional rights of our members in the public sector.

ALBERTA ESSENTIAL SERVICES LEGISLATION ROUNDTABLE DISCUSSIONS:

SUPPLEMENTARY SUBMISSION OF THE ALBERTA UNION OF PROVINCIAL EMPLOYEES

I. Exercising the Right to Strike or Lockout, The Use of Replacement Workers, and the Ability to Access an Alternative Dispute Resolution Mechanism. (Questions 5, 7, 8, and 14)

During the first two days of roundtable discussions, a number of issues emerged. AUPE would like to comment very briefly on these questions.

In our view, what is required is a process that encompasses:

- the employers' ability to lock out employees,
- the employers' ability to manage the "business",
- the employees' right to exercise the Charter right to withdraw their services, and
- the union's right to access alternative dispute resolution (Compulsory Interest Arbitration) when the effect of an Essential Services Agreement has been to cripple the union's ability to carry out strike action.

AUPE therefore suggests a process with the following elements:

1. 120 days before the expiry of the existing collective agreement, the Employer chooses whether to negotiate an Essential Services Agreement with the union or to provide services without the use of bargaining unit members. In the latter event, the employer informs the union of this decision and submits a service delivery plan to the Essential Services Commissioner for his approval.
2. When the employer has chosen to negotiate an Essential Services Agreement, negotiations with the union commence and an Agreement is either negotiated or imposed as per our previous submission.
3. By choosing the Essential Services option, the employer is barred from using replacement workers in the course of any subsequent strike or lockout. This point is essential. Forcing union members assigned to deliver essential services to work alongside replacement workers would make the essential services negotiations and the subsequent Agreement meaningless.
4. Once the Essential Services Agreement is in place, the union chooses whether to pursue collective bargaining with strike/lockout as the dispute resolution mechanism, or to bargain with Compulsory Interest Arbitration as the method for resolving any impasse in bargaining.

II. Amending Essential Services Agreements During a Strike or Lockout (Question 9)

A piece of essential services legislation runs the risk of allowing workers to exercise their right to strike, but imposing conditions that mean that right can be exercised only in situations where the strike is likely to fail.

In the current context, if a union has opted for strike action as per the above submission, and it becomes necessary to amend the Essential Services Agreement by declaring additional workers essential, the striking employees may find the amendment has altered the conditions of the strike to the extent that it is now unwinnable. A similar situation could arise if events in the workplace triggered conditional provisions of an ESA, again resulting in additional strikers being compelled to report for work.

For a union and its members who have endured days or weeks of financial hardship on the picket line to have their strike undermined by such an occurrence is clearly uncacceptable. It also undermines the process through which the ESA has been negotiated and the strike/lockout option has been selected by the union. A strike vote among union members has to be based on the positions of the parties in bargaining, not on an assessment of the likelihood of extraneous events undercutting the union's ability to prosecute the strike once it is already underway.

In theory, at least, the same set of circumstances could occur for an employer who has opted for a lockout if, for example, the union were to achieve an amendment to the Essential Services Agreement that reduced the number of services/functions deemed essential.

AUPE submits that in either case the affected party, and only the affected party, should be able to make application to either the Special Tribunal or the Essential Services Commissioner to have the dispute sent to binding arbitration. The Tribunal or Commissioner would have a mandate to rule on only one questions: "Does the Amendment to the Essential Services Agreement (or the triggering of a conditional provision of the ESA) significantly affect the balance of forces in the dispute?" AUPE believes the Special Tribunal is the appropriate decision maker because some degree of specialized knowledge of the sector may be required in deciding this issue.

III. Other Labour Relations Code Issues: Constraints on Picketing, and First Agreement Arbitration

Given that Essential Services Legislation in itself constitutes a limitation on the right to strike and results in measures that weaken the strikes that do occur, other legislative measures that unfairly disadvantage strikers should be eliminated. In particular, Section 84 of the Labour Relations Code imposes a blanket ban on secondary picketing. In 2002, the Supreme Court of Canada ruled in Pepsi-Cola Canada Beverages (West) Ltd. V. Retail, Wholesale and Department Store Union Local 588, etc. that the same provision in Saskatchewan legislation was unconstitutional. Section 84 should be amended or deleted from the Code.

The arguments advanced in support of first agreement arbitration are well known, and don't require reiteration in this submission. It should be pointed out, however, that first agreement arbitration is especially important under an essential services legal regime, where workers new to the union movement can find themselves confronting an employer determined to prevent a first collective agreement and to subsequently decertify the union. In these circumstances, conducting a strike or withstanding a lockout while being hampered by an Essential Services Agreement places these workers and their unions in an untenable position.

AUPE thanks the Government for the opportunity to make these supplementary submissions.

Alberta Union of Provincial Employees
10451 - 170 Street NW, Edmonton, AB T5P 4S7
T: 1-800-232-7284 F: (780) 930-3392
www.aupe.org

15255