United Nurses of Alberta

United Nurses of Alberta submission to the Essential Services Legislation Review

October 30, 2015

EXECUTIVE SUMMARY

Recent legal decisions, including an important ruling by the Supreme Court of Canada, have significantly restricted the ability of governments to use legislation to impose blanket bans on strikes or impose broad definitions of "essential services" that have the same impact. By ruling that members of health care unions have a constitutionally protected right to strike, the Supreme Court forced the Government of Alberta to begin a process of rewriting laws governing labour relations in Alberta.

United Nurses of Alberta believes the ruling from the Supreme Court constitutionally protects the premise that all workers have a right to strike until such time they are deemed by the government, employer and union to be providing an essential service.

UNA also believes aspects of its traditional approach to ensuring the delivery of essential services during strikes will be helpful to the government in drafting new legislation that protects the public and patients at the same time as it respects the constitutionally protected rights of health care workers.

In addition, UNA proposes recommendations for a framework for drafting Charter-compliant essential services legislation and a series of specific recommendations for changes to the Alberta Labour Relations Code that would safeguard the rights of working people while ensuring the delivery of essential services during labour disputes.

Such a framework must make it possible for issues to be addressed on a sector-by-sector or workplace-by-workplace basis by individuals who are familiar with the sector or workplace, the services provided and the effect of the withdrawal of those services. In this spirit, UNA approached Alberta Health Services to prepare joint recommendations to this review, but was rebuffed.

In this submission to the Essential Services Legislation Review, UNA recommends 13 specific changes that will improve the Alberta Labour Relations Code for unions, employers and the government.

Two appendices are also attached to provide historical background and responses to the government's discussion guide.

CURRENT UNA POLICY ON ESSENTIAL SERVICES

United Nurses of Alberta, a health care union representing more than 30,000 Registered Nurses and allied health workers in Alberta, has always acknowledged that essential services, strictly defined in accordance with the ordinary meaning of the words, must continue in health care settings during any labour dispute resulting in job action by members.

During strikes by UNA members that took place in 1977, 1980, 1982 and 1988, members in the affected workplaces formed essential services committees to ensure nursing services required for the protection of the lives and health of patients continued to be delivered.

UNA's policy is as follows:

In the event of a strike, UNA will withdraw nursing services. UNA will not negotiate any level of regular staffing. It is in UNA's view the responsibility of the Employer to plan and ensure alternate arrangements are in place. However, consistent with our professional responsibilities and past practice, UNA will provide emergency services authorized by the Local.

All Locals will organize an Emergency Services Committee responsible for providing nursing services. Nursing services will be provided if the staff available to the Employer (management nurses, doctors, etc.) are incapable of providing the needed services and only where the need for nursing services arises due to unusual circumstances beyond the regular day-to-day-operations.

Exceptions to the above policy will only be made in situations where the withdrawal of services would threaten life or limb and where the Employer can show that it has attempted but has been unable to make alternate arrangements, and where the exception has been agreed to by the Local.

The fact job actions took place without loss of life and with the maintenance of essential services illustrated responsible strike action can occur during a labour dispute in health care.

RECENT LEGISLATIVE & LEGAL DEVELOPMENTS

The Alberta Court of Queens Bench, in its decisions in *Alberta Union of Provincial Employees, Guy Smith and Michael Dempsey v. Alberta*; *Health Sciences Association of Alberta, Elisabeth Ballermann and Kelley Garland v. Alberta*; and *United Nurses of Alberta , Heather Smith and Irene Gouin v. Alberta* ruled that sections 96(a) and (b) of the *Labour Relations Code* and section 70 of the *Public Service Employee Relations Act* violate the *Canadian Charter of Rights and Freedoms* and are not saved by s.1 of the *Charter*, and are therefore without force and effect.

This follows the Supreme Court of Canada, in its January 30, 2015, decision in *SFL et al v. Government of Saskatchewan 2015 SCC 4*, which confirmed that members of health care unions have a constitutionally protected right to strike. While all services provided by health care union members are important, not all of these services are "essential" with respect to the protection of life, health and personal safety of the public.

The Alberta government has acknowledged the need to draft new essential services legislation and that process is under way.

THE CURRENT LEGAL SITUATION

The Supreme Court has ruled legislation must be enacted that balances the right to strike with the ongoing need to provide of essential services.

UNA looks forward to substantive and meaningful consultations with the Government of Alberta with the goal of developing new essential services legislation that protects both the health and safety of the public and the collective bargaining rights of health care union members, which includes the right to strike.

UNA believes the Supreme Court decision sets out the following five basic principles, which must guide any new or amended essential services legislation to ensure it is compliant with the *Charter*:

1. The right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.
2. The test to be applied to any essential services legislation is whether the legislative interference with the right to strike amounts to a substantial interference with collective bargaining. If it does, a breach of a Charter right exists and the Court must then determine whether the interference with a Charter right is justified under s. 1 of the Charter.
3. Any employee will almost certainly have "essential" and "non-essential" duties and cannot be required to carry out both during job action. Requiring employees to perform both essential and non-essential work during a strike undercuts their ability to participate meaningfully in and influence the process of pursuing collective workplace goals.
4. The definition put forward by the International Labour Organization's Committee on Freedom of Association, which defines essential services "as those needed to prevent a clear and imminent threat to the life, personal safety or health of the whole or part of the population" ought to apply. We need not reinvent the wheel. The fact that withdrawal of a service will create inconvenience does not constitute it as an essential service.
5. Where the right to strike has been impaired or removed, an adequate, impartial and effective alternative mechanism for resolving collective bargaining disputes must be in place. A meaningful mechanism requires decision-makers with impartiality, independence and expertise.

MOVING FORWARD TOWARD NEW LEGISLATION

In order to be *Charter*-compliant, Alberta's new essential services legislation will need to incorporate the principles in the five points above.

Since a collaborative process will provide better results than the imposition of amended or new legislation, UNA believes the following four key areas must be addressed:

1. How to determine what are essential services and answer the question, "How will those essential services be provided?"
2. The dispute resolution mechanism that will be used in the event the parties cannot reach an agreement.
3. How to determine whether the level of essential services that must be maintained renders the right to strike ineffective.
4. The dispute resolution method that will be used to impose a collective bargaining agreement in the event the level of services deemed to be essential renders the right to strike ineffective.

PROPOSED CHANGES

UNA believes a legislative framework should clarify the issues highlighted above.

However, UNA also believes the framework must make it possible for the issues to be addressed on a sector-by-sector or workplace-by-workplace basis by individuals who are familiar with the sector or workplace, the services provided and the effect the withdrawal of those services would have on risk to life, health and the personal safety of the public, or any portion of the public.

UNA proposes the following specific points be included in changes made to the Alberta Labour Relations Code:

1. Every employee has the legal right to strike until it is determined otherwise.
2. No later than 60 days prior to the earliest date to serve notice to bargain, the employer, the government or the union may make application for some or all of the affected employees to be deemed essential. If no application is made 60 days prior to the beginning of the time period in which a union or employer is able to give notice to bargain, none of the affected employees shall be deemed essential.
3. If an application to deem employees' services essential is made, the applicant must name the employee, unit or workplace and provide a complete explanation of the rationale for seeking the designation.
4. Upon receipt, the union and the employer will meet and negotiate whether the employee or employees should be deemed to be providing essential services.
5. Should the union or the employer object to the designation, a tripartite board will hold a hearing within 7 days and issue a decision within 72 hours of the end of the hearing. The tripartite board shall base the decision on the question: "Is this worker needed to prevent a clear and imminent threat to the life, personal safety or health of the whole or part of the population?"
6. Those deemed essential will not be permitted to strike. The current collective agreement in place at the time will continue to apply to those employees and the employer until a new collective agreement is ratified by the union and the employer.
7. If more than 75 per cent of a unit is deemed essential, the entire unit will be deemed essential.
8. In the event an entire unit is deemed essential, the parties will continue to negotiate and use mediation. If the dispute is not resolved through negotiation and mediation it will be resolved at interest arbitration.
9. No employee who has not been declared essential shall be disciplined for refusing to cross a legal picket line, nor will any employee be disciplined for refusing to perform work normally done by employees on a legal strike, or for refusing to perform non-essential duties during any legal strike.
10. In the event an employee in a non-striking bargaining unit, chooses not to cross a picket line, the employer, government or union may make application for them to receive essential services designation.

11. Rules will be established governing the use of replacement workers during a strike similar in intent and wording to the replacement worker regulations used by the British Columbia Labour Relations Board:

    Just as the picketing provisions limit the lawful things employees can do during a strike or lockout, the replacement worker provisions of the Code limit what an employer can do. Employers are prohibited from using newly hired employees to replace employees who are engaged in a legal strike or who are locked out.

    "An employer can continue to operate during a labour dispute by using non-bargaining unit personnel at that operation. Management staff cannot be transferred or used from other operations or facilities of the employer, however, unless they were transferred before the notice to commence collective bargaining for the new agreement was given.

    "Any person who is not in the bargaining unit at the operation has the right to refuse to do work of bargaining unit members during a strike or lockout. To protect this right, employers are not allowed to penalize or discipline employees who refuse to do such work." (Source: Chapter Six, Guide to the Labour Relations Code of the Province of British Columbia)

12. Provisions for First Contract Arbitration, as exists in seven other provinces across Canada, will be legislated.

13. Eliminate the current regulations that determine which employees have the right to associate with other employees for the purposes of collective bargaining. The current four functional bargaining units do not reflect the reality of a workplace where four classes of professional nurses exist (Licensed Practical Nurses, Registered Nurses, Registered Psychiatric Nurses, Nurse Practitioners).

    In Alberta, the Labour Relations Board and regulations have determined that "auxiliary nursing care" must be a separate bargaining unit. Dividing direct care and auxiliary care nurses into two separate bargaining units fails to recognize the reality of today's health care environment. In addition, a fourth class of professional nurses, Nurse Practitioners, are currently barred by law from participating in collective bargaining in Alberta. Changes need to be made to allow nurses to associate together for the purposes of collective bargaining.

APPENDIX I

UNA Historical Approach to Essential Services

Since it was founded on May 6, 1977, United Nurses of Alberta has always acknowledged essential services must be maintained in health care settings, and must continue during any job action. UNA has a long history of negotiating collective agreements, often without any job action but sometimes involving strikes. These are the historical circumstances from which we draw our conclusions in this submission.

On July 4, 1977, UNA began a legal strike affecting 2,500 nurses employed at the Royal Alexandra Hospital in Edmonton, Edmonton General Hospital, Red Deer Hospital, Calgary General Hospital, Holy Cross Hospital in Calgary, St. Michael's Hospital in Lethbridge, and Grande Prairie Hospital.

On July 8, 1977, by Order-in-Council of the provincial government, a public emergency was declared and UNA members were ordered back to work, with the provision of an emergency tribunal to award a settlement binding on both parties.

In 1978, UNA successfully negotiated a hospital collective agreement without strike action.

On April 18, 1980, 6,400 UNA members began legal strike at 79 Alberta hospitals. The Alberta government issued an Order-in-Council on April 21, 1980, ordering the nurses back to work that same day. The nurses refused to return to work and UNA commenced legal action to challenge the validity of the back-to-work order. During the time UNA's counsel was in court arguing the case, bargaining resumed and a negotiated settlement was reached on April 27, 1980. Nurses returned to work with the negotiated settlement on April 28, 1980.

On February 16, 1982, 6,000 UNA members began a legal strike at 69 Alberta hospitals. UNA represented 8,300 hospital nurses in bargaining but only 6,000 were actually in a legal position to strike. Bill 11 was introduced and adopted on March 10, 1982, giving the government the authority to order the nurses back to work on March 11.

On March 11, 1982, nurses returned to work and UNA began the long process of tribunal hearings.

In May 1982, eight Health Unit Association of Alberta employers locked out more than 300 UNA members from worksites in Leduc, Strathcona County, Vegreville, Minburn, Vermilion, Lethbridge and East Central Alberta. The lockout lasted one month before a negotiated settlement was reached.

On April 11, 1983, the Minister of Labour introduced Bill 44 to the Alberta Legislature with the goal of removing the legal right to strike from all hospital workers, including nurses. This legislation provided for compulsory arbitration rather than strikes or lockouts as the method of settling disputes during the negotiations process.

On April 1, 1985, UNA members at eight health units began a legal strike. A settlement was reached with one employer in September 1985 but the strike continued at seven other worksites. In January 1986, ten months after the strike started, UNA reached tentative agreements with the seven other employers.

On January 25, 1988, 14,000 nurses commenced strike action impacting 98 Alberta hospitals. This was the first time hospital nurses did not have had the legal right to strike, and all hospital nurses were called out on strike. On February 12, 1988, a settlement was reached and UNA members voted to accept an improved offer from the employer. The nurses returned to work February 13, 1988.

UNA members employed at the Foothills Medical Centre, Glenrose Rehabilitation Hosptial and Charles Camsell Hospital participated in the 1988 strike but did not participate in the earlier strikes because they did not have the right to strike. The University of Alberta Hospital continued to operate during the 1988 strike because a different union, the Staff Nurses Association of Alberta, represented the employees at the time.

In 1990, UNA achieved negotiated agreements at both hospitals and health units without the need for any job action.

On July 12, 1991, UNA members at the Bethany Care Centre in Cochrane commenced a legal strike for their first Collective Agreement. A first agreement was not reached until December 16, 1991.

UNA renegotiated most of its Collective Agreements from 1992 to 1997 without any consideration of job action. In 1997, UNA and the Provincial Health Authorities Association of Alberta had a difficult round of negotiations and UNA held a provincial strike vote. With a 72 per cent turnout of eligible voters, 85 percent of voters and 98 per cent of UNA locals indicated a willingness to take strike action, even though it was illegal. The parties were able to reach a tentative agreement without any strike action.

Since that time, UNA has experienced only one strike – at the Devonshire Care Centre, where Registered Nurses struck for two weeks in early 2012 in order to achieve an acceptable first agreement.

In the case of each job action listed in this historical review, UNA was prepared to, and when requested, would provide employees to provide essential services. There was never any suggestion during these strikes that there was a threat to patient safety.

APPENDIX II

UNA responses to questions included in the Discussion Guide – Essential Services Legislation for Alberta's Public Sector

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

   UNA considers all workplaces to be appropriate fits for essential services legislation.

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

   See UNA's submission to the Essential Services Legislation Review.

3. *Essential services agreements generally contain provisions that set out how essential services will be provided in the event of a work stoppage, such as identification of the work functions that constitute essential services and the classifications and numbers of employees required to work during a strike or lockout. What, if any, of these provisions in essential services agreements should be required by legislation?*

   See UNA's submission to the Essential Services Legislation Review.

4. *Essential Services Agreements are usually developed around a process where the employer provides an initial proposal to which the union subsequently responds; however, that response can take on different forms.*

   See UNA's submission to the Essential Services Legislation Review.

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?*

   Should the union or the employer object to the designation, a tripartite board will hold a hearing within 7 days and issue a decision within 72 hours of the end of the hearing. The tripartite board shall base the decision on the question: "Is this worker needed to prevent a clear and imminent threat to the life, personal safety or health of the whole or part of the population?"

6. *What should happen for collective bargaining tables that are already underway by the time essential services legislation comes into force? Should the legislation contain transitional provisions to account for collective bargaining that may have already commenced, or should essential services be implemented fully on proclamation?*

   The law should be respected.

7. *What should happen if an employer and union cannot agree on the provision of essential services? The proposed model assumes that ultimately a neutral third party will adjudicate any differences; however, while in the course of negotiations, other supports could be provided. Should there be mediation/conciliation provisions?*

   The employer and union should participate in mediation and conciliation process prior to arbitration. This should be conducted through Alberta Mediation Services.

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

   See UNA's submission to the Essential Services Legislation Review.

9. *Once an Essential Services Agreement is concluded, can it be amended? What should happen if, during a strike or lockout, an essential services agreement becomes inadequate to protect the health, safety and well-being of the public?*

   An essential services agreement can be amended when the employer and union agree to do so. If the parties are unable to agree on amendments, then arbitration can be sought. This could be used in extreme circumstances such as an epidemic or medical emergency.

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

    The Government of Alberta is not the employer of employees represented by UNA. By creating an arms-length health authority, the government has made clear its decision to not directly provide health care in our province. If there is job action, whether it be a strike or lock out, then the parties involved should be required to submit a copy of an essential services agreement to the government.

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?*

    Essential service agreements should not be ongoing in nature. If it is decided that certain employees fall in this category, then the employer should not be permitted to ever eliminate those positions deemed essential.

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? Options include*

    The current collective agreement in place at the time of job action will continue to apply to employees deemed essential and the employer until a new collective agreement is ratified.

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.*

    Penalties in the Labour Code have little impact of the decision by employees to take job action. Recent actions by governments in Canada have shown that employers and government prefer to use contempt of court.

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.*

    If more than 75 per cent of the bargaining unit is deemed essential, the entire unit will be deemed essential. In the event an entire unit is deemed essential, the parties will continue to negotiate and use mediation. If the dispute is not resolved through negotiation and/or mediation it will be resolved at arbitration.

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?*

    There should be a common compulsory arbitration provision included in the framework.

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-arbitral items listed in section 30 of PSERA)?*

    All items should be subject to the possibility of arbitration.