



Essential Services for Public Post-Secondary Institutions

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1. History

Models of strike regulation:

- Unfettered strike model
- Designated or controlled model
- No strike – binding arbitration model
- Ad hoc model (Return to work legislation)

Alberta PSLA – provided for non-strike – binding arbitration model.

SCC decision – *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

Right to strike is an essential component of collective bargaining which is protected by section 2(d) of the *Charter of Rights and Freedoms* (freedom of association).

1. History - *cont'd*

Alberta's response:

- Bill 4 – *An Act to Implement a Supreme Court Ruling Governing Essential Services* (May 27, 2016).
- Bill 7 – *An Act to Enhance Post-secondary Bargaining* (May 4, 2017).

Impact on Public Post-secondary Institutions:

- Designated/controlled strike model.
- Division 15.1 – Essential Services applies (see s. 95.2(1)(d)).

2. What is an “essential service?”

- Act adopts the ILO definition
- Section 95.1 sets out two considerations:
 - (a) a service, the interruption of which would endanger the life, personal safety or health of the public,
 - (b) a service that is necessary for the maintenance and administration of the rule of law or public security.
- Not a test of inconvenience or economic harm.

2. What is an “essential service?”

– *cont'd*

- QUESTION – What is the ultimate impact on public interest if Employer is no longer able to provide the service?
- University and College environment can raise unique issues – i.e. clinical work, animal care, on-going research projects, etc.

2. What is an “essential service?”

– *cont'd*

- Two methods to address:
 - i. Address non-essential service issues in ESA but question if you could push the issue to impasse in light of duty to bargain in good faith: see s. 95.4(3).
 - ii. Address non-essential service issues in separate strike protocol agreement. Enforcement through LRB processes on strike/lockout (Division 13) or through a process agreed to by the parties.
- Section 95.8(1) (c) needs to be considered. If you include non-essential services in an ESA, designated workers cannot participate in a strike against the employer.

3. Exemptions

- Exemptions can be granted by the Commissioner where:
 - i. there are no employees performing essential services; or
 - ii. essential services can be maintained during a strike or lockout by other capable and qualified persons who are not employees in the bargaining unit and who are not hired as replacement workers.
- Exemptions orders can be rescinded.
- Question if replacement workers can be hired if exemption is granted (section 95.41(3)).

4. Elements of an essential services agreement

Mandatory elements set out in s. 95.41(1):

1. Identify the essential services that are to be maintained
2. Set out classifications and number of employees in classifications required to perform the essential services.
3. Provide a method for assigning work to employees.
4. Set out procedures to respond to emergencies and foreseeable changes to the essential services.
5. Set out changes to terms and conditions of employment that will apply during strike or lockout.
6. Identify sufficient umpires (at least one) to be available to provide timely resolution of disputes during a strike or lockout.

5. Process for negotiating an essential services agreement

- Section 95.4(1) and (2) – must give written notice to the other party with proposals for an essential services agreement.
- Section 95.4(3) – must negotiate in good faith and make every reasonable effort to enter into an essential services agreement.
- Section 95.4(4) and (5) – can complain to ESC if party fails to comply with (2) or (3) and Commissioner can rectify.

5. Process for negotiating an essential services agreement – *cont'd*

- Practical issues:

Need for disclosure from employer (identify essential and non-essential positions, classifications, numbers, shift schedules, other capable and qualified persons).

Select umpire to assist with bargaining? Use of subject matter experts (i.e. clinicians) in negotiations to determine levels and deployment issues.

See list of issues you might want to address in your ESA.

6. Appeals

- Review of Umpire's Award to Commissioner, s. 95.42(7) – 10 days/unreasonable test.
- Significant Change in Circumstances, s. 95.45(1) – emergency or unforeseeable change in circumstances – Commissioner can declare dispute is to be resolved by binding arbitration (Declaration of substantial interference with meaningful collective bargaining).
- Essential Services Dispute, s. 95.7(8) – review of umpire's decision on grounds of unreasonableness (10 days to file).

7. Implementation of essential services agreement

- Section 95.44(1) – submit ESA to Commissioner for filing.
- Use Labour Relations Board form (<http://www.alrb.gov.ab.ca/>) at the Workplace Related Tab – Forms – Essential Services – Joint Submission (ES-03).
- Both parties need to sign declarations regarding (a) essential services will be maintained during strike or lockout, and (b) the ESA will not substantially interfere with meaningful collective bargaining.

7. Implementation of essential services agreement – *cont'd*

- Declarations are accepted as *prima facie* evidence supporting the acceptance of the ESA.
- If either party declares the ESA would result in substantial interference, Commissioner will determine if ESA is acceptable for filing. This would generally involve a hearing.
- Provide the Commissioner with full ESA agreement and a redacted copy if any information in the ESA is required to be kept confidential.

7. Implementation of essential services agreement – *cont'd*

- Once the ESA is approved, the parties can apply for formal mediation under section 65(2.1).
- The Commissioner can consent to the appointment of a mediator under s. 65(2.1)(d) without the parties having an approved ESA.
- Strike or lockout can take place if ESA has been accepted for filing, cooling-off period has ended and successful strike/lockout vote is in place.

8. Use of replacement workers

- Section 95.41(3) – employer cannot use the services of a person, whether paid or not, who is hired by the employer for the purpose of, or who is supplied to the employer by another person for the purpose of, performing the work of an employee in the bargaining unit that is on strike or lockout.
- There is some debate as to whether the anti-replacement worker provisions apply when the Commissioner grants an exemption.

9. Deployment of managers

- Section 95.41(3) - ... the requirement for designated essential services workers is to be determined having regard, subject to subsection (3), to the availability of other capable and qualified persons who are not members of the bargaining unit.
- Section 149(1)(f) – makes it an unfair labour practice for an employer to suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of the employee's refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike that is permitted under this Act.

9. Deployment of managers – *cont'd*

- As a result, you cannot deploy any person who is included in the definition of “employee” whether union or non-union as they cannot be required to perform struck work under s. 149(1)(f) and are therefore not “available.”
- Persons excluded from the definition of “employee” are potentially deployable. Under s. 58.1(4) of the *Code*, in the Post-secondary world, this would include managers and named professionals set out in section 1(1)(ii) and (iii) of the *Code* provided they are not included in any of the three post-secondary bargaining units (academic staff, graduate students, postdoctoral fellows), and persons employed in a confidential capacity in matters related to labour relations.

9. Deployment of managers – *cont'd*

- For these groups, it will need to be more specifically assessed whether they are “available” (given continuing need in their current position) and “capable and qualified” to perform other work they are being asked to fill.