SUBMISSION

Essential Services

Amendments to *Bill 128, The Saskatchewan Employment Amendment Act, 2013*

Presented to:

Honourable Don Morgan
Minister of Labour Relations and Workplace Safety

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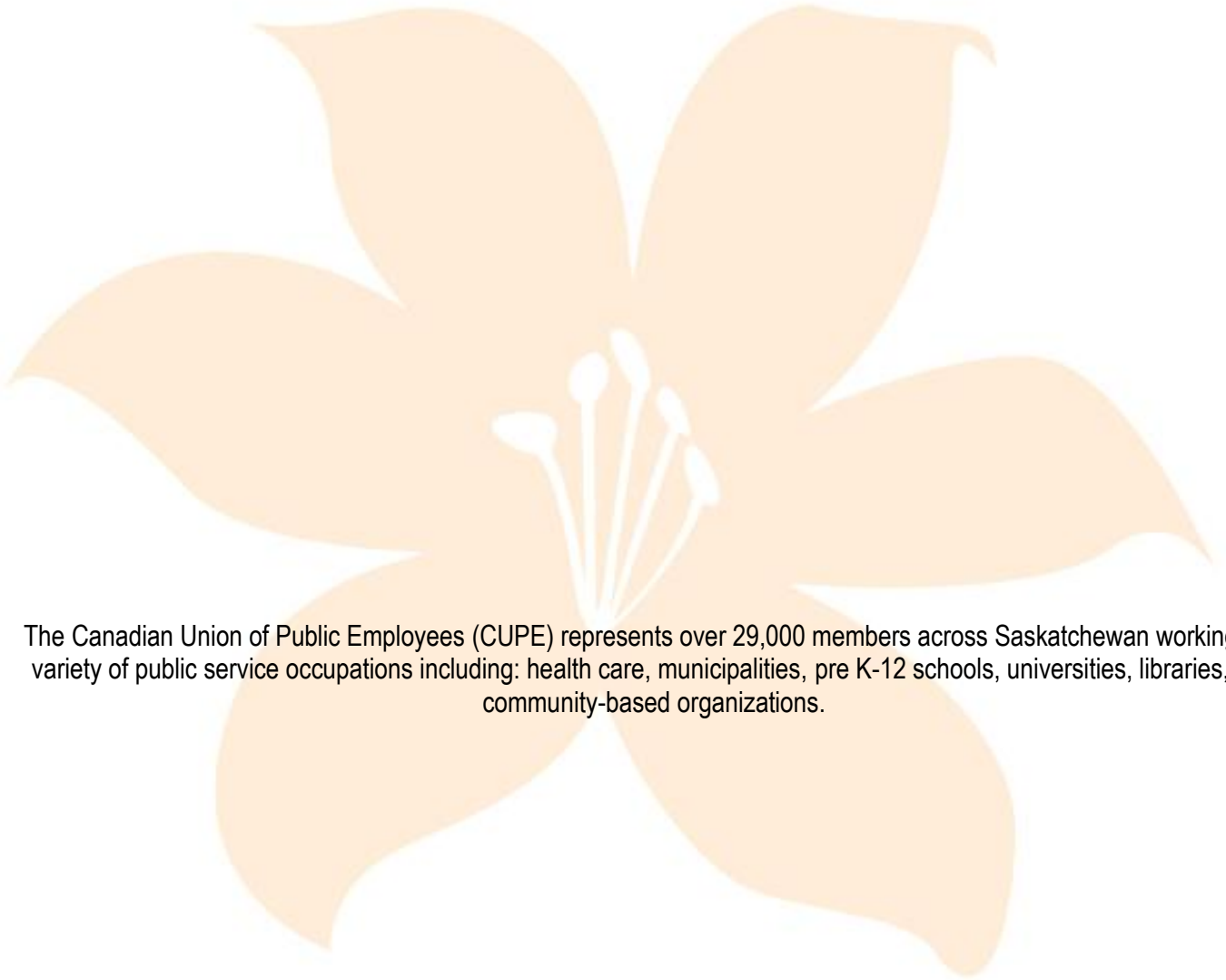

The Canadian Union of Public Employees (CUPE) represents over 29,000 members across Saskatchewan working in a variety of public service occupations including: health care, municipalities, pre K-12 schools, universities, libraries, and community-based organizations.

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INTRODUCTION

Bill 128, The Saskatchewan Employment Amendment Act, amends *The Saskatchewan Employment Act* and repeals *The Public Service Essential Services Act* to establish a new essential services process limiting the right to strike.

Bill 128 passed third reading on April 29, 2014, received royal assent on May 14, 2014, and comes into force on proclamation. Bill 128 has not been, to date, proclaimed into force.

In a letter dated May 15, 2015, the Minister of Labour Relations and Workplace Safety invited CUPE to participate in discussions and to provide a written submission on potential amendments to *Bill 128, The Saskatchewan Employment Amendment Act, 2013*, following the Supreme Court of Canada's decision in *Saskatchewan Federation of Labour v. Saskatchewan, 2015* SCC 4 on January 30, 2015. According to the letter, the government intends: "to take this opportunity to revisit Bill 128 and identify if, and what, changes are necessary to comply with the Court's decision; as well as the implications of any potential changes."

This submission is provided without prejudice to any legal challenge or positions, current or future, to The Saskatchewan Employment Act or any government action.

CUPE requests the right to provide further submissions if and when any further draft legislation is made available.

EXECUTIVE SUMMARY

In CUPE's view, changes remain necessary to make Bill 128, *The Saskatchewan Employment Amendment Act, 2013* consistent with sensible labour relations policy, with our members' fundamental rights, and with s. 2(d) of the *Canadian Charter of Rights and Freedoms,* based on the Supreme Court of Canada's decision in *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4 (*"SFL")*.

CUPE has identified three areas that require further legislative change, as follows:

1. The definition of essential services is too broad and will likely result in over-designation of union members as essential. The definition should be redrafted to reflect the definition endorsed in international law and by the Supreme Court of Canada.

2. The legislation should be amended to give unions the unilateral ability to determine if essential services designation levels have made it impossible to exercise the right to strike, and to access interest arbitration to resolve the bargaining impasse; and,

3. Legislative fetters on the interest arbitration board's discretion in crafting an award must be removed. They improperly interfere with the integrity of the arbitration process and the independence of the arbitration panel.

This submission is provided without prejudice to any legal challenge or positions, current or future, to The Saskatchewan Employment Act or any government action.

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DISCUSSION OF RECOMMENDATIONS

OVERBROAD DEFINITION OF ESSENTIAL SERVICES

Bill 128 currently defines "essential services" as follows, in s. 7-1(1)(c):

"Essential services" means, with respect to a public employer, services provided by the public employer that are necessary to enable a public employer to prevent:

i) Danger to life, health or safety;
ii) The destruction or serious deterioration of machinery, equipment or premises;
iii) Serious environmental damage; or
iv) Disruption of any of the courts of Saskatchewan

This is significantly broader than how the Supreme Court said, in *SFL*, essential services ought to be defined. Based on the consistent jurisprudence of the Committee of Experts of the International Labour Organization (The ILO), the Supreme Court said that the definition of essential services ought to be limited to those needed to prevent a "clear and imminent threat to the life, personal safety or health of the whole or part of the population" (at para. 92).

In order to prevent over-designation by employers in the course of collective bargaining with a union representing public and para-public employees, it is recommended that the statutory definition be limited to that set out above, and specific services be brought under that definition, as may be appropriate. It is recognized that the jurisprudence of the ILO permits for the designation of specific services beyond this definition as essential – for example, law enforcement and court services. These may be designated in special industry-specific legislation (such as the former *Fire Departments Platoon Act,* RSS 1978, c F-14), regulations, or on a case-by-case basis by public employers under the definition endorsed above, subject to challenge by the union in accordance with the procedures set out in Bill 128.

Recommendation:

The statutory definition of essential services in s. 7-1(1)(c) should be limited to those needed to prevent a "clear and imminent threat to the life, personal safety or health of the whole or part of the population."

DETERMINATION OF WHETHER STRIKE OR LOCKOUT IS INEFFECTIVE

The determination of whether essential services designation levels interfere with the right to strike is a question with significant constitutional import. The Supreme Court and international legal authorities prescribe that where legislation impairs the right to strike because of essential services, it must provide access to "an adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses" in order to be consistent with the right to freedom of association (*SFL* per the Majority at para. 96).

CUPE is concerned that the process set out in s. 7-19 is too cumbersome and time consuming to meet constitutional requirements for access to an alternative mechanism to resolve the bargaining impasse. In its current form, Bill 128 requires a full, adversarial hearing before the Labour Relations Board to determine whether essential services designation levels are unconstitutionally high. CUPE is not confident that the Labour Relations Board is appropriately resourced or has the intimate knowledge of the specific workplace or sector required to make a fully informed determination of whether essential services designation levels are truly necessary or impermissibly high.

The ILO has said that where interest arbitration and other dispute resolution procedures are required to offset the impact of essential services designations on the right to strike:

> "It is essential that all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned" [ILO. Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee. Geneva, International Labour Office, Fifth (revised) edition, 2006, at para. 598].

The ILO's Committee on Freedom of Association came to the same conclusion when it considered the complaint brought by NUPGE et al. against *The Public Service Essential Services Act*. In its case report, the Committee stated that "restrictions on the right to strike should be accompanied by **adequate, impartial and speedy** conciliation and arbitration proceedings in which the parties concerned have confidence and can take part at every stage" (Committee on Freedom of Association, 356th Report, Case No. 2654 at para. 376) [Emphasis added].

These international legal requirements apply as much to the interest arbitration board members as to those decision-makers controlling access to interest arbitration – in the case of s. 7-19 of Bill 128, the Labour Relations Board.

As an alternative to the process set out in s. 7-19, CUPE recommends that unions themselves be permitted to determine whether the right to strike has been rendered ineffective, and when interest arbitration should be accessed. It is unions, as opposed to the Labour Relations Board, who are most familiar with the sectors and workplaces, the services provided and the effect the withdrawal of those services would have. Therefore, unions are in the best position to determine whether interest arbitration is necessary as recompense for interference with the constitutional right to strike.

Support for this recommendation can be found in the reasons of *SFL* itself. The Supreme Court quoted from an influential Canadian labour law text by Paul Weiler, in emphasizing the profound imbalance of power that would result absent access to interest arbitration where the ability to stage effective strike action is impaired:

> "If we pull all the teeth of a union by requiring provision of imperative public safety services, such that any remaining strike option does not afford the union significant bargaining leverage, then I believe the union should have access to arbitration **at its option**" [Emphasis added, at para. 93].

CUPE is seriously concerned that without the ability for unions to unilaterally opt for interest arbitration, s. 7-19 will create a *de facto* imbalance of power in collective bargaining. In our view, this would "disrupt the balance between employees and employer that s. 2(d) seeks to achieve" (*SFL, supra,* at para. 77).

While s. 7-19 is couched in apparently neutral language that is applicable to both unions and public employers, given government *qua* legislator's past willingness to legislate an end to labour disputes on an *ad hoc* basis, our concern is that public employers are just as likely to take the legislative route and therefore avoid a potentially cumbersome and resource-consuming process with no guaranteed outcome. A similar possibility arises were a public employer to unsuccessfully apply under s. 7-19(1) for an order declaring the right to lockout ineffective. That same public employer might seek back-to-work legislation to end a labour dispute after already failing to achieve the same result at the Board (but not before the respondent union(s) spend considerable time and money defending such an application).

These possibilities and more arise because of the dual role of government (legislator and employer) in public sector labour relations. Even in cases where government is not the legal employer, the simple fact of one public purse aligns the government's interests with that of the specific public employer. In CUPE's view, the only way to avoid the disruption in the balance of power that arises out of these possibilities (whether they materialize or not), is to grant unions the ability to unilaterally insist on interest arbitration. Such an approach worked well in the federal civil service for over 40 years, and in our view it is necessary to ensure Saskatchewan's essential services law is minimally impairing of our members' constitutional right to strike.

For these reasons, and based on these authorities, CUPE recommends that the determination of whether essential services levels are so high as to impair the right to strike ought to be left to unions themselves to make, and that access to interest arbitration to conclude a collective agreement where a union's members have been designated essential must be at the union's unilateral election, subject only to the existing requirement that the union engage in good faith bargaining before declaring an impasse (included in s. 6-33 of *The Saskatchewan Employment Act*).

Recommendation:

The legislation ought in s. 7-19 to give unions the unilateral ability to determine if essential services designation levels have made it impossible to exercise the right to strike, and to access interest arbitration to resolve the bargaining impasse.

LEGISLATIVE FETTERS ON THE INTEREST ARBITRATION BOARD'S JURISDICTION

Finally, Bill 128 interferes with the independence of arbitrators in a number of ways that must be removed in order to preserve the integrity of the interest arbitration process. As already noted, above, the ILO's Committee on Freedom of Association has stated that impartiality is essential to ensure the confidence of the parties and the effectiveness of the arbitration process. In addition to compliance with international law, maintaining the confidence of the parties is also good labour relations in the public sector.

First, s. 7-22(a) prescribes the number of evidentiary and legal matters that the interest arbitrator or interest arbitration board "shall" consider, that do not reflect the well-established arbitral case law concerning interest arbitration awards, and arguably fetter the interest arbitrator or board's jurisdiction in an unconstitutional manner.

Second, s. 7-22(b) indicates that the interest arbitrator or board "may" consider a number of evidentiary and legal matters, some of which have traditionally always guided interest arbitration awards, which represents a further legislative interference with the integrity of the interest arbitration process and the jurisdiction and independence of interest arbitrators and arbitration boards.

Traditionally, in the delicate balancing act that is required to craft a collective agreement for parties who have been unable to conclude their own agreement through collective bargaining, interest arbitrators have been guided by a set of rules developed over decades of labour relations practice and experience. It would arguably be a legal error for an interest arbitration board to render an award that did not consider these principles:

- **Conservatism or Incrementalism** – As a rule, agreements achieved through interest arbitration are inherently conservative, in which breakout proposals will not be achieved by either side (see CUPE's July 2012 response to

the Consultation Paper on the Renewal of Labour Legislation in Saskatchewan, Essential Services Chapter online at http://www.cupe.sk.ca/updir/sk/ckfinder/files/Section%2025_31%20july%202012.pdf).

- **Replication** – There is a "universally accepted replication principle" that says "as a substitute for free collective bargaining, the objective of interest arbitration must be to provide those whose access to free collective bargaining is abridged with roughly the same result as would otherwise be achieved in free collective bargaining" (*Corporation Of The City of Toronto v Toronto Professional Fire Fighters Association, Local 3888,* 2013 CanLII 62276 (ON LA) (Burkett)).

- **Comparability –** The interest arbitration award "should flow from an analysis of objective data regarding the terms and conditions of employment currently existing within the public and private sectors in the relevant labour market" (*Windsor Regional Hospital and CAW-Canada Local 2458,* March 1, 2013 (Tacon, Chair) online at http://www.minemill598.com/PDF/sectors/health-care/arbitration-awards/2013-Tacon-Award-Windsor-Regional-Hospital-CAW.pdf). It has been noted that "within the universe of relevant criteria, pre-eminence of place has almost invariably been given, both by arbitrators and by legislators, to the comparability factor": *Halifax Regional Municipality* (1998), 71 L.A.C. (4th) 129 (Kuttner) – so it makes no sense that comparability is included as a discretionary criterion for the interest arbitration board to consider in s. 7-22(b) of Bill 128.

CUPE is very concerned that the legislative fetters on the interest arbitration board's jurisdiction are unconstitutional in the same way that legislation limiting the outcomes of collective bargaining was found by the Supreme Court to offend s. 2(d) of the *Charter*, in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia,* 2007 SCC 27 (CanLII). As interest arbitration board chair Kevin Burkett recently ruled in an interest arbitration award conducted under *The Ontario Fire Protection and Prevention Act,* 1997:

> "It would be difficult to conclude that statutory interest arbitration parameters that robbed an impartial interest arbitrator of his/her essential discretion by, in effect, prescribing a particular result or even by narrowing the range within which a fair and reasonable result might otherwise fall would not run afoul of *B.C. Health*. After all, just as there can be no "substantial interference" with the right to free collective bargaining, there can be no "substantial interference" with free, fair and impartial interest arbitration where it is legislatively substituted for free collective bargaining" (see *Corporation of the City of Toronto v Toronto Professional Fire Fighters Association, Local 3888,* 2013 CanLII 62276 (ON LA) (Burkett)).

In short, putting legislative fetters on the outcome of an interest arbitration process is as problematic, constitutionally, as if legislation purported to pre-determine the outcome of a collective bargaining process: *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General),* 2013 BCCA 371 (CanLII).

Further, as noted above, international legal authorities on freedom of association recognise that the interest arbitration board must be independent, free from bias, and enjoy the confidence of both parties to the arbitration process. In Canada, the Supreme Court has also recognised that, particularly in the case of interest arbitration, it has been recognized that in selecting arbitrators, it is necessary to appoint persons "who are not only independent and impartial but possess appropriate labour relations expertise and are recognized in the labour relations community as generally acceptable to both management and labour" (*C.U.P.E. v. Ontario (Minister of Labour),* 2003 SCC 29, [2003] 1 SCR 539 at para. 208 per Binnie J. For the Majority).

The independence of the interest arbitrator from government is critical to an effective labour relations outcome. As noted by the Federal Court in two recent decisions vacating the unilateral government appointments of interest arbitrators, (see *Canadian Union of Postal Workers v. Canada Post Corporation,* 2012 FC 110 (CanLII) and *Canadian Union of Postal Workers v. Canada Post Corporation,* 2012 FC 975):

> "…If arbitrators are, or are perceived to be, a surrogate of either party or of the government, or appointed to serve the interests of either party or the government, the system loses the trust and confidence of the parties, elements essential to industrial relations peace and stability…A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent."

Interference with the jurisdiction of the interest arbitration board in s. 7-22 offends this principle, by making the interest arbitration board serve the interests of government, who will always be, in the case of an interest arbitration under Bill 128, the employer party to the arbitration.

Recommendation:

The legislative fetters on the interest arbitrator's discretion set out in s. 7-22 of Bill 128 must be removed.

CONCLUSION

The Minister of Labour Relations and Workplace Safety invited CUPE to participate in discussions and provide a written submission on potential amendments to Bill 128, *The Saskatchewan Employment Amendment Act, 2013*.

CUPE makes the following recommendations regarding the new proposed essential services framework:

1. The statutory definition of essential services in s. 7-1(1)(c) should be limited to those needed to prevent a "clear and imminent threat to the life, personal safety or health of the whole or part of the population."

2. Section 7-19 should be amended to give unions the unilateral ability to determine if essential services designation levels have made it impossible to exercise the right to strike, and to access interest arbitration to resolve the bargaining impasse; and,

3. The legislative fetters on the interest arbitrator's discretion set out in s. 7-22 of Bill 128 must be removed.

CUPE makes the above recommendations without prejudice to any legal challenge or positions, current or future, that may be taken against or under The Saskatchewan Employment Act and/or any related legislation.

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