# SUBMISSION

## Essential Services

# Amendments to *The Saskatchewan Employment Act*

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, K-12 schools, universities, libraries, and community-based organizations.

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# Introduction

CUPE recognizes that our members working in a variety of public sector occupations across Saskatchewan provide public services that contribute to and protect public health and safety.

The overwhelming majority of public sector collective agreement negotiations in this province are concluded without job action. In the rare event that truly essential services are likely to be discontinued as a result of protracted and frustrated collective agreement negotiations with the employer, it is appropriate that an Essential Services Agreement (ESA) be negotiated between the union and the employer to ensure the discontinuation of services or job duties do not represent immediate and serious harm to life and public safety.

Since the passage of *The Public Service Essential Services Act* in 2008, the Government of Saskatchewan has publically committed to reviewing and amending the legislation and intends to bring forward amendments to this Act within *The Saskatchewan Employment Act* during the upcoming Fall Session of the Legislative Assembly of Saskatchewan.

In a letter dated June 25, 2013, the Minister of Labour Relations and Workplace Safety provided a copy of the proposed new essential services framework and, by way of the letter, requested CUPE's views on the proposed framework. Subsequent information regarding the new essential services framework was provided at a July 18, 2013 meeting between CUPE leaders and Mike Carr, the Deputy Minister of Labour Relations and Workplace Safety, and Pat Parenteau, the Director of Policy for the Ministry of Labour Relations and Workplace Safety.

While not comprehensive, this submission is intended to provide recommendations to the Minister of Labour Relations and Workplace Safety regarding the proposed new essential services framework.

*This submission is provided without prejudice to any legal challenge, current or future, to The Public Service Essential Services Act and/or The Saskatchewan Employment Act.*

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

# Government proposed new essential services framework

## Main features of government proposed new framework

CUPE's understanding of the features of the new framework, based on the information provided, is as follows:

- **Timing of Essential Services Agreement (ESA) linked to bargaining impasse.** There will be no prescribed time period for the negotiation of an Essential Services Agreement (ESA). The obligation to negotiate an ESA may arise when the parties reach impasse, which we assume will be triggered by the delivery of a notice of impasse in accordance with Section 6-33 of *The Saskatchewan Employment Act*.

- **Unilateral designation of essential services after strike vote if no ESA concluded.** The employer will be allowed to unilaterally designate essential services (classifications and numbers) if the Collective Bargaining Agreement (CBA) has expired and the union has obtained a strike mandate in a strike vote.

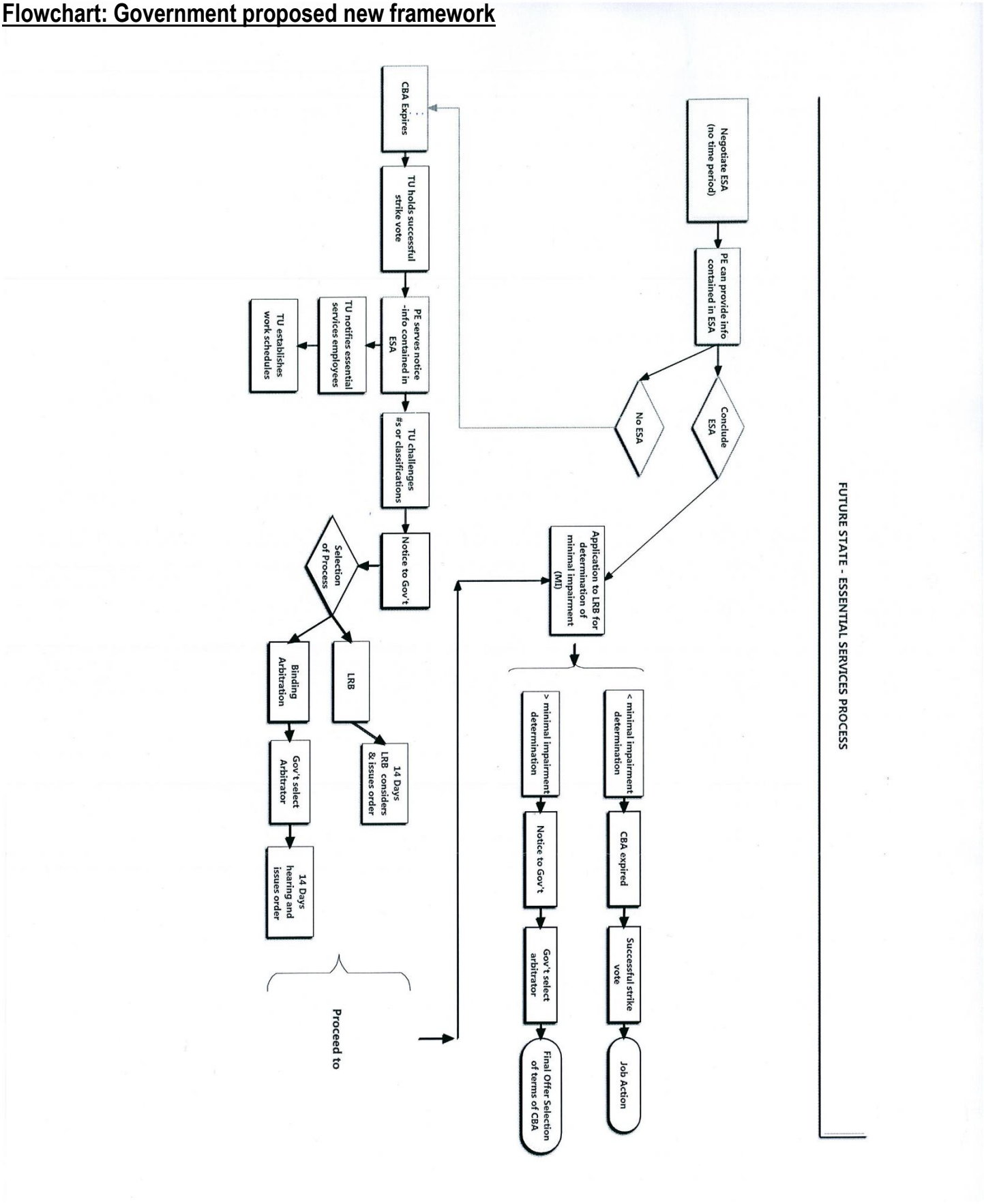
- **Use of out-of-scope staff to cover essential jobs.** Employers will be required to use out-of-scope staff to cover some positions.

- **Union participation in notification, scheduling of essential workers.** Individuals will not be named; rather, it appears, the union will be involved in notifying and scheduling employees to work the essential jobs during a strike and could choose to rotate members through the positions.

- **Two methods to challenge employer designation.** If the union does not agree with the essential services levels designated by the employer, it may apply to the Labour Relations Board (LRB) for review or choose binding arbitration by a government-appointed arbitrator.

- **Final offer selection interest arbitration if right to strike impaired.** The model provides that if an ESA is concluded whether by agreement or through arbitration or the LRB, and the agreement is found not to "minimally impair" the right to strike by the LRB, the government will "select" an arbitrator to which all items outstanding in contract negotiations will be referred for "Final Offer Selection of the terms of the CBA". It is unclear what is contemplated by the use of the term "final offer selection". According to notes of the meeting, the final offer selection would be on disputed issues left on the bargaining table only.

## Flowchart: Government proposed new framework



# Discussion

## Unilateral employer designation of essential services should be removed

According to the information provided, the employer will be allowed to unilaterally designate essential services (classifications and numbers) if the CBA has expired and the union has obtained a strike mandate in a strike vote. CUPE took the position in its July 2012 response to the Consultation Paper on the Renewal of Labour Legislation in Saskatchewan that the employer power to unilaterally designate essential services levels in the PSESA created an unnecessary imbalance by giving the employer the ability to severely limit the union's ability to stage strike action in order to avoid the inconveniences inherent in operating during a job action.[i] These concerns remain insofar as the employer will continue to have an ability to unilaterally designate essential services.

- CUPE submits that it would be more appropriate to require the parties to engage in good faith negotiations towards the conclusion of an ESA following a strike vote, failing which the employer could provide to the union an initial designation of classifications that would be subject to full review by an independent third party on an expedited basis.

## Duty to bargain in good faith should be included

There does not appear to be a duty to bargain in good faith with respect to the negotiation of an ESA, as the flowchart provides only that the public employer "can provide information contained in ESA" to the Union during the negotiations. In CUPE's July 2012 response to the Consultation Paper on the Renewal of Labour Legislation in Saskatchewan, CUPE advised that it would be necessary to require the parties to bargain in good faith with respect to an ESA, including the obligation to share the information necessary to have a rational, reasonable, and principled exchange over designation levels.[ii]

- Even though the new proposed framework contains some significant improvements over the current PSESA, CUPE maintains that it is necessary to incorporate a duty to bargain in good faith.

## Arbitration should be the method for dispute resolution

The proposed framework contemplates two possible dispute resolution mechanisms if the union does not agree with the essential services levels designated by the employer. The union may apply to the Labour Relations Board or the issue may be referred to an arbitrator "selected by the government." CUPE is concerned that neither of these dispute resolution options, as they are presented, are consistent with good labour relations policy, nor do they meet the standard required to protect freedom of association.

ESAs are needed only in times of high conflict, when negotiations have broken down and job action is imminent. Given that the ESA mediates between compelling competing interests – the interests of workers, employers, and the communities whose safety is safeguarded by essential services workers – the agreements must be seen as fair.

- CUPE observes that employers and workers are far more likely to cooperate and administer ESAs in good faith if all parties have confidence in the process by which the agreements are made. Freely negotiated ESAs would be the best option. Where agreements cannot be negotiated, independent third party adjudication is the only acceptable substitute.

## Parties should be able to choose arbitrators

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."[iii]

The Federal Court recently vacated the appointments of two arbitrators appointed by the Harper government to conclude a collective agreement between Canada Post and the Canadian Union of Postal Workers following a 2011 job action.[iv] Quoting from the Supreme Court's decision in *CUPE v. Ontario*, the Federal Court explained that "…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."[v]

The International Labour Organization (ILO) Committee of Experts has said that, where essential services requirements prevent effective strike action, unions must have access to "adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented," and further, "In mediation and arbitration proceedings 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."[vi]

- CUPE recommends that any new essential services framework or model provide for arbitration by arbitrators jointly selected by the parties.

## Full panel interest arbitration not final offer selection

Final Offer Selection (FOS) is proposed as the model of interest arbitration that would be available to unions and employers who are unable to conclude a collective agreement and it is not possible for the union to stage effective strike action because of the level of essential services designated or provided for in the essential services agreement. It has been consistently reflected in legal and academic authorities that full panel interest arbitration, rather than FOS, is the only acceptable alternative to job action to conclude a collective agreement where collective bargaining has failed. This position has been embraced by employers and unions alike in the Canadian context.

The reasons for preferring interest arbitration to FOS include that interest arbitration best replicates the bargain the parties may have reached themselves if they were allowed access to job action. In a case recently decided by the Canada

Industrial Relations Board, *Marine Atlantic Inc., v. CAW-Canada, 2010 CIRB 507*, FOS was rejected in favour of mediation-arbitration for the following reasons:

- The fact that FOS produced a "winner" and a "loser" meant that the resultant award was less credible with the losing party, which is not conducive to the creation and maintenance of constructive labour relations; and,

- Depending on the positions taken by the parties, FOS may produce disparate results and disturb internal equity in the organization, compared to traditional interest arbitration.

Full panel interest arbitration is preferred to ensure that both parties have an ability to fully participate in the process and to feel that their positions have been represented.

In *Re Greater Toronto Airports Authority, [2005] C.I.R.B.D. No. 16 (QL)*, the Canada Industrial Relations Board discussed the advantages of full panel interest arbitration to conclude a collective agreement. First, the presence of partisan nominees ensured that both sides of the issue would be examined. Second, the parties could appoint nominees who had familiarity with the employment context and in whom the parties had confidence. According to the Board, in the circumstances, these benefits of a tripartite panel far outweighed the factors of cost and any inefficiencies of the process.

To be an effective substitute for free collective bargaining where job action is not possible due to legislative limits on the right to strike, interest arbitration must be a fair process, but also one that is seen to be fair by both workers and employers. As the Board of Interest Arbitration chaired by Kevin Burkett recently ruled in an interest arbitration award conducted under *The Ontario Fire Protection and Prevention Act, 1997*: "Where the legislature, in its wisdom, decides that in the interest of the greater public good the right to free collective bargaining must be restricted to the extent that economic sanctions are not permitted, i.e. police, fire and health services, the alternative must be fair, impartial and transparent."[vii]

CUPE observed in our July 2012 response to the Consultation Paper on the Renewal of Labour Legislation in Saskatchewan that agreements achieved through interest arbitration are inherently conservative, in which breakout proposals will not be achieved by either side.[viii] There is no compelling rationale to choose FOS instead of full panel interest arbitration to conclude collective agreements where job action is not possible because of essential services requirements. On the other hand, there are compelling reasons why access to full panel interest arbitration is necessary where the parties have no recourse to job action and are unable to conclude a collective agreement through good faith bargaining.

In other jurisdictions, legislators, employers, unions and other stakeholders have rejected FOS in favour of other methods of concluding collective agreements and job actions. Arbitrators surveyed by the Task Force on Work Stoppages in the Federal Private Sector unanimously agreed that FOS, although very rarely used in Canada, produces bad bargains.[ix] In a review of *The Ontario Colleges Collective Bargaining Ac*t, Justice Kevin Whitaker, then-Chair of the Ontario Labour Relations Board, recommended that the never-used FOS provision contained in the Act be removed.[x]

- CUPE recommends full panel interest arbitration, not FOS, be used to conclude CBAs where the right to strike has been taken away from essential services workers.

## Concerns about "impasse" process overlapping the essential services framework

CUPE is concerned that linking the obligation to negotiate an ESA to "impasse" – a term which is nowhere defined in *The Saskatchewan Employment Act* – may not be appropriate. In our experience, impasse in bargaining does not necessarily mean job action is imminent, and job action is not our first response to a bargaining impasse. Sometimes the parties do not

agree on a key issue, but they still have work to do at the bargaining table that will bring them closer to a collective agreement. Yet, under *The Saskatchewan Employment Act*, notice of impasse can be unilaterally served by either party (s.6-33(1)), which will trigger the appointment of a mediator, conciliator or labour relations officer, and the mandatory mediation and cooling off period.

If the negotiation of the ESA is to overlap the mandatory mediation process and the cooling off period, it will divert the parties' attention and resources, making it even more difficult to conclude a CBA whether with the assistance of a third party or through renewed efforts at the bargaining table. More problematically, imposing an obligation to negotiate an ESA at impasse could very well interfere with the union's ability to communicate with members with respect to the bargaining mandate, to hold a strike vote, or to prepare for job action. These effects would be unjustified infringements on freedom of association, given that a disruption of services is not necessarily imminent at impasse.

In CUPE's July 2012 response to the Consultation Paper on the Renewal of Labour Legislation in Saskatchewan, CUPE indicated that "at the very earliest, an ESA should be negotiated when strike notice is served."[xi] CUPE submits that employers and unions could be better served by the negotiation of Letters of Understanding providing for a method of determining essential services, including timelines and a dispute resolution process that would tie the establishment of essential services levels to the actual occurrence of job action.

- In sum, CUPE maintains that the obligation to negotiate an ESA should arise only after the union has obtained a strike mandate, and only if the parties have not negotiated an agreement that provides for a different process or timing.

# CUPE's recommendations

The Minister of Labour Relations and Workplace Safety invited CUPE to participate in discussions on proposed new amendments to *The Public Services Essential Services Act* which will be incorporated into *The Saskatchewan Employment Act* as amendments to be introduced during the upcoming Fall Session of the Legislative Assembly of Saskatchewan scheduled to commence October 23, 2013 and conclude December 5, 2013.

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

1. **Essential Services Agreements (ESAs) should be negotiated after a trade union achieves a strike mandate.**

    - CUPE observes it is appropriate to only legally obligate the consideration of an ESA once a strike mandate has been successfully achieved and strike action may occur. However, CUPE recommends there should be an obligation and opportunity for both parties to negotiate an ESA rather than permit the employer to unilaterally designate essential services designations. The negotiation time period for an ESA could be 14 days.

    - CUPE also observes that it is also appropriate to have an essential services framework that permits parties, at a time of their choosing, to negotiate an ESA and follow a process their freely negotiated agreement describes.

2. **Employers should not have the ability to unilaterally designate essential services.**

    - CUPE recommends it would be more appropriate to require the parties to engage in good faith negotiations towards the conclusion of an ESA following a strike vote rather than permit the employer to unilaterally designate essential services, failing which the employer could provide to the union an initial essential services designation that would be subject to arbitration.

3. **ESA negotiation should contain a duty to bargain in good faith.**

    - CUPE recommends that the parties be required to bargain in good faith with respect to an ESA, including the obligation to share the information necessary to have a rational, reasonable, and principled exchange over designation levels.

4. **Job duties, not entire job classifications, are essential.**

    - In order to be consistent with an essential services regime that is minimally impairing of the right to strike, CUPE recommends that duties not positions should be designated as essential. Employers should also be required to consider whether duties can be assumed by out-of-scope staff not union members if possible, in order to avoid designating a classification essential or to minimize the number of workers required.

5. **Employers should have restrictions placed on the ability to lock out employees.**

   - In order to be consistent with international law, CUPE recommends that, to ensure good faith negotiations, there should be restrictions placed on the ability of employers to lock out or to threaten to lock out workers. Restrictions on an employer's ability to lock out workers should be during the negotiations of an ESA, during periods of pending arbitration decisions, or any other period where the right to strike is also restricted or prevented.

6. **ESA dispute resolution and "minimal impairment" determinations should rest with arbitration not the Labour Relations Board.**

   - CUPE recommends that disputes surrounding an ESA and the determination of an ESA's minimal impairment should be resolved through binding arbitration by an arbitrator mutually agreeable to both parties wherever possible. CUPE observes the Labour Relations Board may not possess the resources, knowledge, or expertise to evaluate essential services designations and levels in specific workplaces.

7. **Full panel interest arbitration rather than final offer selection for outstanding terms of the CBA when an ESA is determined to <u>not</u> be "minimally impaired".**

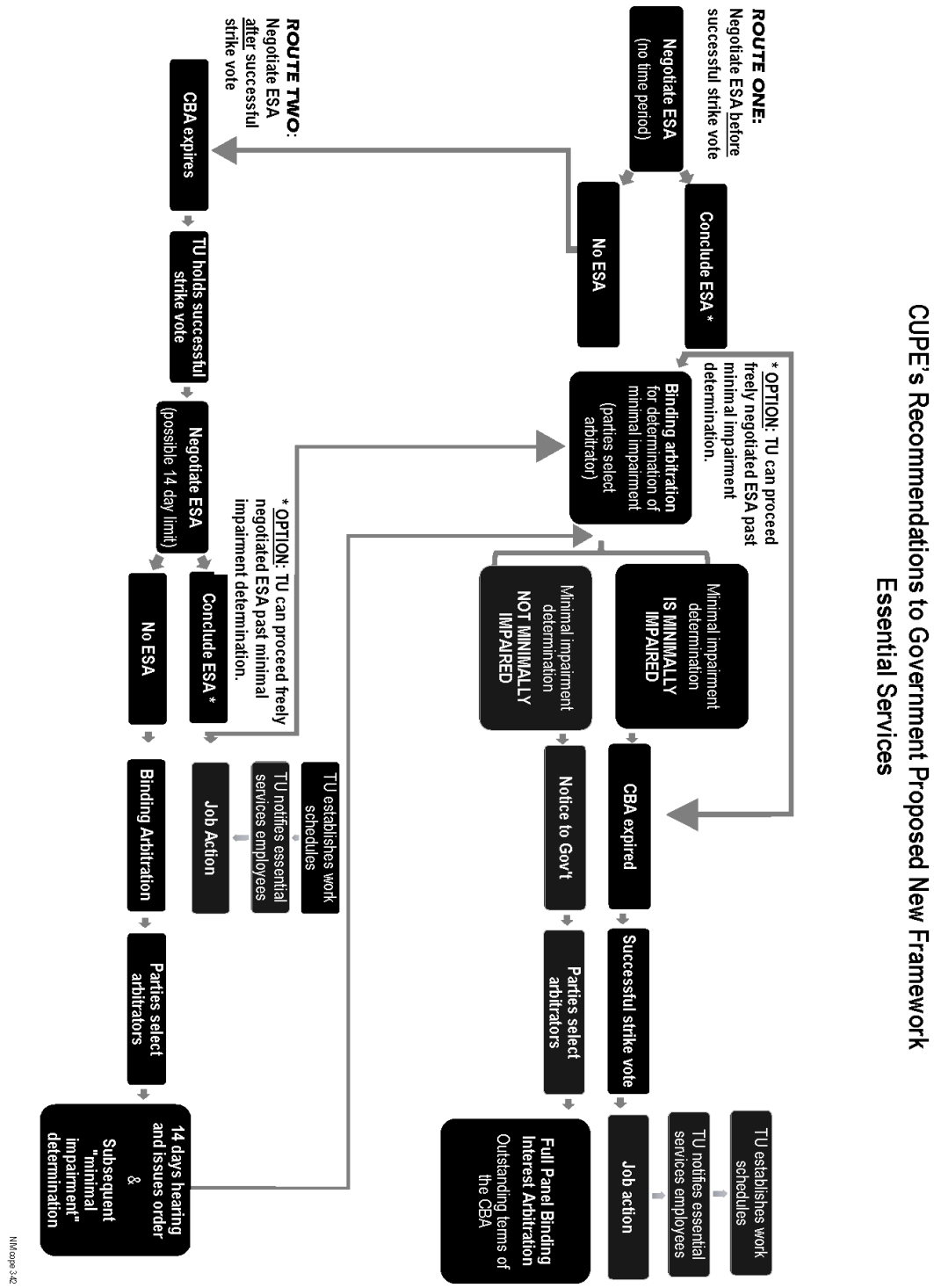
   - When an ESA has been determined to be <u>not</u> "minimally impaired" meaning that the essential service designation would prevent an effective strike, CUPE recommends the framework provide for full panel interest arbitration by arbitrators mutually agreeable to both parties wherever possible to ensure both parties have an ability to fully participate in the process and to feel that their positions have been represented.

8. **Arbitrators should be jointly selected wherever possible.**

   - It is paramount that arbitrators have the full confidence of both parties and be strictly impartial and independent from the government. CUPE recommends that arbitrators be jointly selected wherever possible.

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

## Flowchart: CUPE's recommendations to government proposed new framework



# Endnotes

[i] Essential Services Chapter online at http://www.cupe.sk.ca/updir/sk/ckfinder/files/Section%2025_31%20july%202012.pdf.
[ii] Ibid.
[iii] 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.
[iv] 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.
[v] 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.
[vi] ILO. Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee. Geneva, International Labour Office, Fifth (revised) edition, 2006, at paras. 596 and 598, online at http://www.ilo.org/wcmsp5/groups.public/@ed_norm/@normes/documents/publication/wcms 090632.pdf.
[vii] See City of Toronto v. Toronto Professional Fire Fighters Association, Local 3888, unreported, June 26, 2013 (Burkett), online at http://lawofwork.ca/wp-content/uploads/2013/06/Award-June2013.pdf.
[viii] Essential Services Chapter online at http://www.cupe.sk.ca/updir/sk/ckfinder/files/Section%2025_31%20july%202012.pdf.
[ix] Annis, Peter. Work Stoppages in The Federal Private Sector: Innovative Solutions. Human Resources and Skills Development Canada, 2008; online at http://www.hrsdc.gc.ca/eng/labour/labour_relations/wsfps/docs/report.pdf last visited July 11, 2012, at p.13.
[x] Kevin Whitaker, A Review of the Colleges Collective Bargaining Act (Canada: Minister of Training, Colleges and Universities, 2008) p. 84.
[xi] Essential Services Chapter online at http://www.cupe.sk.ca/updir/sk/ckfinder/files/Section%2025_31%20july%202012.pdf.

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