ESSENTIAL SERVICES TRIBUNAL

UNIVERSITY OF SASKATCHEWAN, Employer and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Union

LRB File No. 015-19; June 27, 2019

Chairperson, Susan C. Amrud, Q.C.
Tribunal members: Christopher Boychuk, Q.C. and Aina Kagis

For University of Saskatchewan:	David M.A. Stack, Q.C. Kit McGuinness
For Canadian Union of Public Employees, Local 1975	Sachia Longo

REASONS FOR DECISION

Background and Preliminary Issue:

[1] On January 25, 2019, the University of Saskatchewan ["University"] served Notice of Impasse pursuant to section 7-6 of *The Saskatchewan Employment Act* ["Act"], and named Christopher Boychuk, Q.C. as its nominee to an Essential Services Tribunal. On January 28, 2019, the Canadian Union of Public Employees, Local 1975 ["CUPE"] named Aina Kagis as its nominee to the Tribunal. On January 29, 2019 the Chairperson of the Saskatchewan Labour Relations Board named herself as the Chairperson of the Tribunal.

[2] The Tribunal met for the first time on February 4, 2019. At that hearing CUPE advised the Tribunal that it intended to raise a preliminary issue respecting whether Part VII of the Act applied to the University.

[3] The Tribunal reconvened on February 28, 2019 to hear argument on the preliminary issue. CUPE asked the Tribunal to make a declaration that the University is not a "public employer" within the meaning of section 7-1 of the Act and to decline jurisdiction to proceed to a full hearing. It urged the Tribunal to make a decision at that point because, in its view, the University had not met the preliminary threshold of proving it is a public employer.

[4] CUPE argued that, to determine whether Part VII applied, the Tribunal had to make a determination that the University is an employer that provides an essential service to the public.

Part VII does not contain a definition of essential services, therefore the Tribunal must, as its first task, define essential services. CUPE urged the Tribunal to adopt as a definition of essential services, those services the interruption of which would cause a clear and imminent threat to the life, personal safety or health of all or part of the population. This definition, it argued, is consistent with section 2(d) of the *Canadian Charter of Rights and Freedoms* and Canada's obligations under international law. CUPE relied heavily on the jurisprudence of the International Labour Organization ["ILO"], and references to it in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 ["*SFL*"]. International law, it said, is clear that the education sector is not a sector where essential services are provided.

[5] The University argued that the Tribunal could not make a decision without first hearing evidence. Determining whether essential services are provided by an employer is not a summary exercise[1]. It submitted that while teaching is at the core of what a university does, a modern university does so much more; some CUPE members perform jobs that are not education jobs. It provided evidence that indicated a few key areas where, it argued, life, personal safety or health could be affected by a work stoppage.

[6] The University agreed that the *Charter* applies to the determination of what is an essential service. The University also referred to ILO jurisprudence which, it stated, says that the specifics of a job must be considered. If removing a service affects life, personal safety or health, that service can be considered to be an essential service, even if it is delivered in the education sector.

[7] At the end of the hearing of the preliminary issue, the Tribunal made a unanimous decision that it could not, without more evidence, determine whether the University is a public employer.

[8] The Tribunal next reconvened on March 26, 2019. The University provided the Tribunal with a list of positions that it requests be designated as essential: 252.3 FTEs (full-time equivalents) plus 23 FTE call-ins. It indicated that the categories of services it proposes be designated as essential are the same categories as were agreed to by it and CUPE in the essential services agreement they entered into in 2009 pursuant to the now-repealed *Public Service Essential Services Act*. These categories are: human health, protective services, facilities and animal care.

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[1] *Elmwood Residences Inc. v SEIU-West*, 2018 CanLII 38247 (SK LRB).

[9] CUPE countered that while its members provide valuable services, none of those services meet the test to be characterized as essential services. The existence of a clear and imminent threat must be more than hypothetical; being less safe is not sufficient. The Tribunal also needs to consider other employees who are qualified, or could easily become qualified, to provide the service.[2]

[10] The University initially proposed to file ten affidavits and provide no other evidence until after the Tribunal had heard CUPE's evidence. CUPE objected to the University being given leave to split its case in that manner. The Tribunal agreed. The University was not granted leave to split its case and was directed to call the proponents of the affidavits that it proposed to file, so they could be cross-examined.

[11] During a scheduling conference call on April 1, 2019, with the consent of both counsel, the Tribunal ordered, pursuant to subsection 7-8(2) of the Act, that it was necessary for the hearing to extend beyond 60 days. The University called 10 witnesses and CUPE called 18 witnesses, over 11 days of hearings, which finished on June 7, 2019. The hearing concluded when final arguments were presented on June 14, 2019.

Relevant Statutory Provisions:

[12] Part VII of the Act sets out the essential services legislation that applies to this matter. The parties referred to many of its provisions as relevant to the Tribunal's deliberations:

> ***Interpretation of Part***
> *7-1(1) In this Part:*
> *(f) "public employer" means:*
> *(i) an employer that:*
> *(A) is defined in Part VI; and*
> *(B) provides an essential service to the public; or*
> *(ii) any employer, person, agency or body, or class of employers, persons, agencies or bodies, that:*
> *(A) is prescribed; and*
> *(B) provides an essential service to the public;*
> *. . .*
> *(j) "work stoppage" means a lockout or strike as defined in Part VI.*
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> ***Negotiation of essential services agreement***
> *7-3(1) If a public employer and union have not concluded an essential services agreement and the minister and the parties have received a report from a labour relations officer, special mediator or conciliation board pursuant to clause 6-33(7) (c) that a dispute between the parties has not been settled, the public employer and the union shall engage in*

[2] At the conclusion of the evidence, CUPE modified its position to agree to the designation of five employees at the heating plant: three boiler operators and two shift engineers.

collective bargaining with a view to concluding an essential services agreement as soon as is reasonably possible after receiving that report.
(2) Nothing in this section is to be interpreted as preventing a public employer and union from concluding an essential services agreement at any time.

Notice of impasse
7-6(1) If, in the opinion of a public employer or a union, collective bargaining to conclude an essential services agreement has reached a point where agreement cannot be achieved, the public employer or union shall serve a written notice that an impasse has been reached on:
(a) the chairperson of the board;
(b) the minister; and
(c) the other party.
(2) No written notice mentioned in subsection (1) must be served until the period mentioned in subclause 6-33(7)(d)(ii) has expired.
(3) The written notice mentioned in subsection (1) must contain the name of the person whom the party giving the notice appoints to the tribunal.
(4) Within three days after receiving the written notice mentioned in subsection (1), the other party shall serve on the first party, the chairperson of the board and the minister a written notice naming the person whom it appoints to the tribunal.

Essential services tribunal
7-7(1) On receipt of the parties' appointments to the tribunal, the chairperson of the board shall appoint the chairperson or a vice-chairperson of the board as the chairperson of the tribunal.
(2) No person is eligible to be appointed as a member of a tribunal or to act as a member of a tribunal if the person:
(a) has a pecuniary interest in a matter before the tribunal; or
(b) is acting or has, within a period of one year before the date on which the dispute is submitted to the tribunal, acted as lawyer or agent of any of the parties.
(3) The tribunal shall:
(a) hear:
(i) evidence presented relating to the dispute; and
(ii) argument by the parties or their lawyers or agents; and
(b) make a decision respecting the matters mentioned in subsection 7-8(3) that are the subject of the dispute.
(4) The decision of the majority of the members of a tribunal or, if there is no majority decision, the decision of the chairperson of the tribunal is the decision of the tribunal.
(5) In exercising its powers and fulfilling its responsibilities pursuant to this Part, a tribunal may exercise all or any of the powers mentioned in subsection 6-49(3), and that subsection applies, with any necessary modification, to the tribunal.

Period within which tribunal must commence hearing and make a decision
7-8(1) Within seven days after the appointment of the chairperson of the tribunal, the tribunal shall commence hearings.
(2) A hearing of the tribunal must conclude within 60 days after the date on which the hearing commenced or any longer period that the tribunal considers necessary.
(3) Within 14 days after the conclusion of its hearing, the tribunal shall issue a decision on the following:
(a) the essential services that must be maintained during the work stoppage;
(b) the classifications of employees who must work during the work stoppage to maintain essential services;
(c) the number of positions in each classification who must work during a work stoppage to maintain essential services;
(d) the locations or number of locations where work must be performed during the work stoppage;

> *(e) the procedures that must be followed to respond to an emergency during a work stoppage.*

Unfair labour practices re Part
7-28(1) It is an unfair labour practice for a public employer or a union to fail or refuse to engage in collective bargaining with a view to concluding an essential services agreement.
(2) It is an unfair labour practice for a public employer to not take into consideration qualified persons who are in the employ of the public employer and who are not members of the bargaining unit when determining the number of positions in a classification who must work during the work stoppage to maintain essential services.
(3) It is an unfair labour practice for a union to not identify qualified employees when identifying the employees who must work during the work stoppage to maintain essential services.
(4) Part VI applies, with any necessary modification, to an unfair labour practice pursuant to this section.

Essential services employees to continue or resume essential services
7-29(1) If there is a work stoppage:

> *(a) every essential services employee shall, during those times that the essential services employee is scheduled to work, continue or resume the duties that are required in order to ensure that essential services are maintained during the work stoppage by that employee in accordance with the terms and conditions of the last collective agreement, if any;*

Argument on behalf of the University:

[13] The University agrees with CUPE that an essential service is one the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Where the parties differ slightly is whether the Tribunal also needs to find that there would be a clear and imminent threat to life, personal safety or health if the service is removed. The University's position is that the requirement of a clear and imminent threat should not be included as it does not add anything to the concept of essential services. The University takes no issue with a requirement that the threat be clear (as opposed to vague). However, with respect to imminence, it asks the Tribunal to interpret this to mean, not that someone will immediately die or be injured, but that the risk to life, personal safety or health will unacceptably increase. It argues that there are good reasons to maintain the services it proposes, given their direct impact on the personal safety and health of the public, including those members of the public who live, work or study at the University.

[14] The University urges the Tribunal to follow the many decisions that the British Columbia Labour Relations Board (BC LRB) has issued with respect to essential services at universities. It is of the view that the positions it asks be designated as essential are consistent with the industry norms established in those decisions.

[15] With respect to the ILO statement that the education sector is not an essential service, the University urges the Tribunal to look beyond this general statement at more specific statements of the ILO that would lead to a conclusion that while teaching services are not essential, other services provided by a university related to health care, policing and utilities such as heat, cooling and water have been recognized by the ILO as essential services. The fact that the services are provided in an education context is not determinative and certainly not preclusive, as it is the nature of the services that informs the decision to designate a service as essential. When the ILO suggests education is not an essential service, it is referring to teaching services.

[16] The University also points out that the ILO has recognized that a past essential services agreement between an employer and union is a relevant consideration in this context.

[17] The University does not agree with CUPE's characterization of the extent of the burden of proof it bears. It argues that it has satisfied the onus of proving that the requested positions provide essential services.

Argument on behalf of CUPE:

[18] In the absence of a definition of essential services in the Act, CUPE states that the Tribunal should adopt a definition that is consistent with both *Charter* and ILO jurisprudence.

[19] CUPE urges the Tribunal to adopt the following definition of essential services, which is set out in the ILO's *Freedom of Association, Compilation of decisions of the Committee on Freedom of Association*[3]:

> *836. To determine situations in which a strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population.*

It states that the ILO considers services in the education sector to be presumptively non-essential.

[20] In CUPE's view the University has not provided the Tribunal with clear, cogent and convincing evidence that there would be a clear and imminent threat to the life, personal safety or health of the whole or part of the population if the requested services are not designated as essential. In the alternative, if the Tribunal finds that some of the services are essential services,

[3] International Labour Office – Geneva: ILO, 6th edition, 2018.

the University has not proven through clear, cogent and convincing evidence that those essential services cannot be adequately or sufficiently provided by non-CUPE employees. With respect to onus of proof, CUPE states that the overwhelming majority of jurisprudence supports its position that the party alleging that positions are essential carries the onus of proving they are essential.

[21] CUPE suggests that cases interpreting the *Canada Labour Code* provide a useful precedent for the Tribunal. That Code provides that during a work stoppage, the services to be continued are those "necessary to prevent an immediate and serious danger to the safety or health of the public"[4]. CUPE cited the following passage from *Professional Institute of the Public Service of Canada v Atomic Energy of Canada Limited*, 2015 CIRB 774 (CanLII) in support of its position:

> *While an unforeseen catastrophic event could happen that might affect world-wide production, the Board must make its decisions based on evidence and reasonable likelihoods, rather than hypothetical black swan scenarios.*[5]

[22] CUPE argues that the determination of whether there are essential services is inherently fact-specific and can change from one round of bargaining to another depending on the services currently provided, the skills and qualifications of non-bargaining unit employees, and changes in law.

[23] It also noted that, since there are others in Saskatoon that in many cases provide substantially similar services, the provision of those services by the University is not essential.

[24] Lastly, CUPE notes that *SFL* and the Act make it clear that, even if some CUPE members provide essential services, they can only be required to perform their essential duties and not their non-essential duties.

Analysis:

[25] This is the first time that a Tribunal has issued a decision pursuant to section 7-8 of the Act since Part VII came into force on January 1, 2016. Accordingly, the Tribunal must consider in depth two important issues before it can turn to the question of which, if any, CUPE employees provide essential services in this workplace.

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[4] At s. 87.4(1).
[5] At para 37.

Definition of Essential Services

[26] The first issue is the definition of essential services. While there is no definition of essential services in the Act, there is guidance in Canadian and international law. The Tribunal must interpret and apply Part VII in accordance with *Charter* values, in a manner that facilitates and supports employees' freedom of association. The Tribunal agrees with the parties that ILO jurisprudence is also instructive.

[27] Both parties agree that an essential service is one the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Where they differ slightly is whether the definition should also require that there be a clear and imminent threat to life, personal safety or health if the service is removed. The University's position is that the requirement of a clear and imminent threat does not add anything to the concept of essential services. It takes no issue with a requirement that the threat be clear (as opposed to vague). However, with respect to imminence, it asks the Tribunal to interpret this to mean, not that someone will immediately die or be injured, but that the risk to life, personal safety or health will unacceptably increase.

[28] Both parties referred the Tribunal to *SFL* for guidance on this important issue:

> *[82] In Canadian Union of Public Employees, Local 301 v. Montreal (City), [1997] 1 S.C.R. 793, L'Heureux-Dubé J. explained why public sector strike action engages singular considerations:*
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> > *When "public" employees strike, the pressure exerted on the employer is not largely financial, as in the private sector, but rather arises from the disruption of services upon which society depends for the daily activities of its members. While consumers may simply go to another source for goods and services provided by private enterprise, alternatives to the services targeted by the special regimes may be unavailable or very difficult and expensive to obtain. [para. 32]*
>
> *[83] That is why the trial judge accepted that "the principle that it is unacceptable to risk the health and safety of others as a means to resolve a public sector collective bargaining dispute is well established in Canada".*
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> *[84] But it is important to keep in mind Dickson C.J.'s admonition in the Alberta Reference that "essential services" be properly interpreted: It is . . . necessary to define "essential services" in a manner consistent with the justificatory standards set out in s. 1. The logic of s. 1 in the present circumstances requires that an essential service be one the interruption of which would threaten serious harm to the general public or to a part of the population. In the context of an argument relating to harm of a non-economic nature I find the decisions of the Freedom of Association Committee of the I.L.O. to be helpful and persuasive. These*

> *decisions have consistently defined an essential service as a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population" (Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O., supra). In my view, and without attempting an exhaustive list, persons essential to the maintenance and administration of the rule of law and national security would also be included within the ambit of essential services. Mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike. [Emphasis added by SCC; pp. 374-75.]*

[29] In paragraph 92, *SFL* refers to a modified description of essential services:

> *As noted, the ILO's Committee on Freedom of Association defined 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" (Freedom of Association, at para. 581).*

However, the Court does not comment on the inclusion by the ILO of the reference to a clear and imminent threat in the quoted paragraph, or suggest that it establishes a different or higher standard than the definition it quoted in paragraph 84.

[30] The Tribunal notes that in *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, only one paragraph mentions "clear and imminent threat"[6]. All other paragraphs that discuss essential services and refer to a definition describe essential services "in the strict sense of the term" as "services the interruption of which would endanger the life, personal safety or health of the whole or part of the population"[7].

[31] The University provided the Tribunal with descriptions or definitions of essential services in force in ten other Canadian jurisdictions. Eight of them were enacted pre-*SFL* and are therefore not helpful.

[32] The Alberta *Labour Relations Code* defines essential services as follows:

> *Essential services*
> *95.1 For the purposes of this Division, essential services are those services*
> *(a) the interruption of which would endanger the life, personal safety or health of the public, or*
> *(b) that are necessary to the maintenance and administration of the rule of law or public security.*

[6] Paragraph 836.
[7] Paragraphs 830, 831, 837, 838, 843, 851, 866.

This definition was enacted in May 2016 by *An Act to Implement a Supreme Court Ruling Governing Essential Services*, SA 2016, c. 10.

[33] The *British Columbia Labour Relations Code* includes the following provision:

> *72(1) If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute,*
>
> *(a) investigate whether or not the dispute poses a threat to*
> *(i) the health, safety or welfare of the residents of British Columbia, or*
> *(ii) the provision of educational programs to students and eligible children under the School Act, and*
> *(b) report the results of the investigation to the minister.*
> *(2) If the minister*
> *(a) after receiving a report of the chair respecting a dispute, or*
> *(b) on the minister's own initiative*
> *considers that a dispute poses a threat to the health, safety or welfare of the residents of British Columbia, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia.*

Although it was enacted pre-*SFL*, in *Capilano University v COPE*, 2015 CanLII 28767 (BC LRB) the BC LRB considered the effect of *SFL* on its interpretation and appears to make its findings on the basis that it is consistent with *SFL*.

[34] The Tribunal agrees with the University that a requirement of a clear and imminent threat is implied in the definition, by the use of the word “would”. An essential service is not one that “might” endanger the life, personal safety or health of the whole or part of the population, but one that “would”. Adding the requirement of a clear and imminent threat would be inconsistent with *SFL* and ILO jurisprudence. It could also lead to arguments that its addition requires a higher standard, such as an immediate threat.

[35] The Tribunal agrees with the University that the fact that the services being considered are provided in an education context is not determinative and certainly not preclusive. It is the nature of the services, and the effect of their interruption on public health and safety, that informs the decision to designate a service as essential.

[36] The Tribunal finds that an appropriate definition of essential services is services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.[8]

Onus of Proof

[37] The second issue that the Tribunal must consider is the onus of proof in essential services applications.

[38] The BC LRB made the following helpful comments in *University of British Columbia (Re)*, [1999] BCLRBD No. 505 about the issue of onus:

> *20 The parties spent some time in argument debating the principle of onus. In most applications under the Code, which are adversarial in nature, onus may very well be an important principle that the Board may have to decide in a case.*
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> *21 However, I conclude that such a technical argument is not helpful under Section 72. The Board is responsible for the designation of essential services and the monitoring of any facilities, productions or services deemed essential during a labour dispute. This type of responsibility is not found in other Sections of the Code. This responsibility must be taken seriously for obvious reasons. The determination of essential service levels will not be decided on the basis of which party has satisfied what onus. Thus, if the Board considers it necessary to order the production of documents or any other evidence in order to ensure that it has the appropriate information to make a determination, the Board may exercise its discretion to do so regardless of which party arguably bears the onus.*
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> *22 It would be inappropriate for the Board to sustain a party's position on a technical argument that the opposing party did not meet its onus, when ordering such a position may place the residents of the Province in a situation that threatens the health, safety or welfare of the public. Regardless of any technical onus argument, the Board has a statutory obligation under Section 72 to maintain essential services.*

[39] The following finding with respect to onus was also provided to the Tribunal:

> *[35] In Canadian National Railway Company, supra, the Board also made reference to the burden of proof in section 87.4 cases, and indicated:*
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> > *[31] When the activities to be maintained are in dispute, the onus rests primarily with the employer to prove that certain services, operations or facilities must continue despite a strike or a lockout. That being said, both parties have the obligation to provide the Board with convincing evidence supporting their respective positions (Atomic Energy of Canada Limited, supra). It is imperative that the parties assist the Board by providing evidence that will enable it to*

[8] This workplace does not raise an issue respecting the maintenance and administration of the rule of law or national security, therefore that part of the definition is not considered here. This does not preclude it from being considered in an appropriate case.

> *determine whether or not the services are essential in order to protect the health or safety of the public and whether or not a strike or lockout will cause a danger (Nav Canada, [2002] CIRB no.168, at paragraph 168)*.[9]

[40] The Tribunal also considered the following comment respecting onus, in *Public Service Alliance of Canada v Parks Canada Agency*, 2008 PSLRB 97 (CanLII):

> *179 The Board accepts that an application under subsection 123(1) of the new Act launches a process that in some respects resembles a fact-finding inquiry more than a classic adversarial proceeding. The Board's primary role is not to decide which adversary is right but rather to determine an outcome in the public interest. The context and the legislative framework require that the Board's inquiry proceed cautiously in two respects. First, as indicated in the jurisprudence of the former Board, reinforced by the preamble to the new Act, the Board should err on the side of caution in protecting the safety and security interests of the public; see, for example, Canada (Treasury Board) v. Public Service Alliance of Canada, (Radio Operation Group – Technical category). Second, through a different lens, the Board should take care that it not deprive employees of the right to strike (nor, by doing so, undermine the bargaining agent's ability to conduct effective collective bargaining) unless it is satisfied that the evidence before it establishes a sound basis for declaring a service essential or for determining other matters that may be included in an ESA.*
>
> *180 Balancing the need for caution in both respects, the Board takes the view that the principal burden of proof under the new Act continues to rest with the employer, as it did in the past when the employer proposed to designate positions under the former Act. The employer must place evidence before the Board to convince it that there is a reasonable and sufficient basis for finding, for example, that a service is essential, that a certain "type of position" performs that service or that a certain "number of positions" belong to that type.*
>
> *181 The Board does not agree that the burden of proof at some point shifts formally to the bargaining agent, as suggested by the employer, nor that the Board should adopt a "deferential" standard of proof in assessing the employer's position, as the employer also urges. To be sure, the Board may take a deferential posture in determining the content of an ESA, but the appropriate form of deference — in light of the preamble of the new Act — is to the public interest rather than to the employer. Moreover, showing deference to the public interest is certainly not the same as placing a reverse legal burden on the bargaining agent to disprove what the employer proposes.*

[41] In *Amalgamated Transit Union, Local 0591 v Société de transport de l'Outaouais*, 2017 CIRB 849 (CanLII), the Canada Industrial Relations Board made the following comment, at paragraph 164:

> *. . . any restriction of the right to strike must be limited to what is strictly necessary and solely to ensure the health and safety of the public. Moreover, the burden of proof is on the party seeking to have certain activities maintained despite a strike or lock-out, that is, the employer in the present matter.*

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[9] *City of Ottawa and Amalgamated Transit Union, Local 279*, 2009 CIRB 447 (CanLII).

[42] While the legislation under which the Tribunal is to decide this application is different than that applied in each of those cases, the Tribunal is of the view that they provide helpful guidance. The Tribunal agrees that its primary role is not to decide which adversary is right. It would be inappropriate to make a finding based on a technical onus argument when the issue to be decided is what services are required because their interruption would endanger the life, personal safety or health of the whole or part of the population. While it is true that the onus rested primarily with the University to prove that the services it is asking the Tribunal to designate meet the definition of essential services, both parties had an obligation to provide the Tribunal with evidence that supported their positions.

Decision:

[43] The Tribunal now turns to the application of the definition of essential services to this workplace.

[44] The University suggests that its proposals are consistent with industry norms, based on BC LRB essential services cases respecting universities. While the University was able to find a decision of the BC LRB to support each of its requested positions, the Tribunal did not find those decisions particularly helpful to its deliberations. Most have no analysis explaining how the decision was made; they also do not delineate which of the essential services designations were a result of agreement between the parties and which were a decision of the Board.

[45] The ILO has recognized that a past essential services agreement is a relevant consideration when an essential services determination is being made. However, since the legislation under which it was drafted was declared to be unconstitutional in *SFL*, the Tribunal has not considered the agreement entered into by the parties in 2009.

[46] Even though *Public Service Alliance of Canada v Parks Canada Agency*, 2008 PSLRB 97 (CanLII) was decided pre-*SFL*, its guidance continues to be relevant to the Tribunal's decision respecting which of the University's services are essential:

> *One of the more important principles is that collective bargaining rights for public service employees must not be undermined simply because they result in an inconvenience to the public. Inherent in the right to strike, which has been accorded to those employees, is the right to place pressure on their employer to make bargaining concessions. While this right*

> *is to be limited where its exercise will place the safety or security of the public in jeopardy, this limitation must be narrowly construed.*[10]

[47] *Alberta Union of Provincial Employees and CapitalCare*, 2018 CanLII99679 (AB GAA) is a decision of an Essential Services Umpire that interpreted the amendments to the Alberta *Labour Relations Code* enacted in response to *SFL*. He relied on the following comment of the Ontario Labour Relations Board, in a case deciding the number of paramedics that should be designated as essential during a work stoppage:

> *90. Public safety must always be a prominent, perhaps the dominant, consideration. But the Act also dictates that the public interest in free collective bargaining be protected. It is not a question of giving timid tepid lip service to labour relations considerations. Free collective bargaining assumes that there will be negative repercussions in strike or lock-out situations*.[11]

[48] Despite the fact the decision is 20 years old, the Tribunal notes the following comment of the BC LRB in *University of British Columbia (Re)*, [1999] BCLRBD No. 505:

> *8 The legislation also obligates the parties to engage in a mediation process. Given the seriousness of the situation because of the impact a strike may have on the health, safety or welfare of the public, mediation is a critical stage, of the designation process. The parties themselves are more knowledgeable than the Board on the services provided by an employer. The parties should be able to agree upon essential service levels that guarantee the provision of essential services while still putting maximum pressure on the parties in a controlled strike. If the parties approach the mediation process with realistic positions, the need for adjudication will be an exception not the norm.*
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> *9 While maintaining services that the Board "considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia", it is not business as usual for an employer. Qualified management and excluded personnel are utilized to the best extent possible in the provision of essential services. In doing so these individuals will be taken away from their normal non-essential work duties. This will result in an employer ceasing to perform some non-essential functions. As a result the public will be inconvenienced and services disrupted, but not to the extent that the immediate health, safety or welfare of the public is jeopardized. Bargaining unit employees will be ordered to report to work to the extent that qualified management and excluded personnel cannot maintain essential service levels. Depending on the length of a strike, essential service levels may fluctuate. On the one hand staffing levels may be increased because what was not deemed to be essential initially may become so given a lengthy dispute. On the other hand staffing levels may be decreased if it turns out that an employer is able to perform more work with its management and excluded personnel than what was first anticipated.*

[49] While the recognition in *SFL* of a *Charter*-protected right to strike requires the Tribunal to make a decision that causes the least interference with the right to strike, this goal must be

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[10] At para 101.
[11] *Corporation of the City of Toronto v Toronto Civic Employees Union, Local 416*, 2012 CanLII 974 (ON LRB).

balanced with the need to ensure that the life, personal safety or health of the population or a part of the population would not be endangered by a work stoppage.

[50] Both parties agree that CUPE employees perform important support services for the campus community. Part VII of the Act, however, requires the Tribunal to decide that those services are “essential” before their constitutionally guaranteed right to strike will be removed. It also requires that other qualified employees in the employ of the University be taken into account when a decision is made as to whether CUPE employees must perform those services. As CUPE notes, it does not matter if they cannot do the work as well or as efficiently as the CUPE employees can, as long as they can do it well enough to eliminate the danger to life, personal safety or health of the population that would result from their interruption.

[51] The Tribunal finds that the University is a public employer within the meaning of section 7-1 of the Act, because it provides an essential service to the public. As required by clauses 7-8(3)(a) to (d), the Tribunal has set out in Schedule A:

- the essential services that must be maintained during a work stoppage;
- the classifications of employees who must work during a work stoppage to maintain essential services;
- the number of positions in each classification who must work during a work stoppage to maintain essential services; and
- the locations where work must be performed during the work stoppage.

[52] The decisions to not designate as essential the additional positions requested by the University were made on the basis that the work performed by those CUPE employees was not essential and/or available non-CUPE employees are capable of performing those services.

[53] Section 7-28 of the Act requires the University to take into consideration its qualified non-CUPE employees when determining which positions it considers essential. It argued that the Tribunal could not take into account its employees who are members of the Administrative and Supervisory Personnel Association [“ASPA”]. This argument was based on a letter dated November 30, 2018 from the ASPA president to the University president which contained the following statement:

> *In addition, we have advised our members not to perform our CUPE 1975 Brothers' and Sisters' work voluntarily and we respectfully request that the Employer not ask our members to do this work.*

[54] There is no evidence before the Tribunal that the University will accede to this request. Given their obligation in section 7-28, it is arguable that they cannot. That is an issue for another day. Suffice it to say, the Tribunal did not take this letter into account in making its decision.

[55] Comments on specific positions, that the Tribunal considers would be helpful for the parties to understand its decisions, are set out below.

[56] Positions whose absence would directly affect patient care were considered essential. For example, the Tribunal does not agree with CUPE's suggestion that, because health services are available elsewhere in Saskatoon, none of the CUPE employees at the Student Wellness Centre provide essential services. Patricia McDougall's evidence made it clear that these health services, especially the mental health services, are essential for the students' life, personal safety and health. The CUPE employees play an important role in maintaining those services.

[57] On the other hand, many of the requested positions at the College of Medicine are not involved in patient care and are there for the purpose of facilitating student education. Those positions are not essential.

[58] In Protective Services, the Tribunal was advised that two Platoon Members work each 12-hour shift. Therefore, designating six Platoon Members as essential will provide the University with sufficient staff for three shifts, ensuring an acceptable level of rest for those employees. It was also noted that there are some non-CUPE staff in that unit, though their availability to work as Platoon Members was unclear.

[59] In Facilities, the evidence indicated that Custodial Operations works with a staff of 12 people on weekends. Six non-CUPE staff work in this unit, therefore only six CUPE staff are required to maintain essential cleaning.

[60] At law, animals are property. While the BC LRB routinely designates animal care workers as essential, the Tribunal was provided with no cases that provided any analysis of how they reached that conclusion. Much hearing time was devoted to the question of animal care. No one wants to see animals suffer or die as a result of a work stoppage. However, the Tribunal was not satisfied that a danger to life, personal safety or health of people would result if animal care

workers are not designated as essential. Even on the University's own evidence, these positions only affect the health and safety of animals. The only exception the Tribunal found was a technician in the Veterinary Pathology Unit who is responsible for handling hazardous substances. Whether any animal care workers will provide services during a work stoppage is an issue that must be left to the parties to consider on a voluntary basis.

[61] CUPE filed an organizational chart for the Safety Resources Unit[12]. The Tribunal found it very helpful in determining the availability of non-CUPE employees to perform essential services.

[62] The Tribunal appreciates that the University, for the most part, took seriously its obligation to ensure that the positions it asked to be designated actually provided services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. However, the University's evidence also made it clear that other, irrelevant, considerations were taken into account in compiling the list. These included the potential for: property damage; interruption of research; disruption of student education; damage to the reputation of the University; unpaid bills; decreased revenue.

[63] Clause 7-8(3)(a) of the Act requires the Tribunal to designate "the essential services that must be maintained during the work stoppage". The Tribunal agrees with CUPE that this requirement must be interpreted in a manner that is consistent with the following admonition in *SFL*:

> *[91] And even where an employee has been prohibited from participating in strike activity, the PSESA does not tailor his or her responsibilities to the performance of essential services alone. Section 18(1)(a) of the PSESA requires that in the event of a work stoppage, all essential services employees must continue "the duties of [their] employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement" and must not fail to continue those duties "without lawful excuse" (s. 18(2)). Requiring those affected employees to perform both essential and non-essential work during a strike action undercuts their ability to participate meaningfully in and influence the process of pursuing collective workplace goals.*

[64] Therefore, Schedule A sets out which services of each classification of employees are essential and must continue to be provided in the event of a work stoppage. Even with eleven days of hearing evidence, it was not possible for the Tribunal to develop a full understanding of the work life of each of the positions that are being designated as essential. Neither party provided any proposals to assist the Tribunal in this task. The University cautioned the Tribunal that the job

[12] Exhibit U-3.

descriptions they filed were not all up-to-date or accurate. It is to be hoped that parties in similar applications in the future will put more focus on this requirement. The Tribunal encourages the parties to resolve any difficulties in implementing this part of the decision by negotiations between the parties.

[65] The Tribunal notes that section 7-3 of the Act required the University and CUPE to engage in collective bargaining with a view to concluding an essential services agreement. That bargaining did not occur because CUPE took the position, until late in the hearing, that Part VII does not apply to this workplace. This is unfortunate because, even though CUPE was entitled to take that position, the parties are in a much better position than the Tribunal to understand the functioning of their workplace.

[66] The Tribunal was asked to designate some of the requested essential services employees to be available on a call-in basis. The Tribunal has, in some cases, made that designation. It is to be noted that this is different from an emergency. The Tribunal orders that the following process be followed with respect to these employees. If the University decides that it needs to call in one of these employees, it must provide the request to CUPE with sufficient evidence to explain how the work of the requested employee is necessary to address a danger to the life, personal safety or health of the whole or part of the population and why a non-CUPE employee cannot perform the work. The University shall advise CUPE of the requested task and timeframe for the work. CUPE shall provide the requested employee in accordance with the request. If CUPE is of the view that the work required was not an essential service, that issue can be addressed by the parties later.

[67] Clause 7-8(3)(e) of the Act requires the Tribunal to establish "the procedures that must be followed to respond to an emergency during a work stoppage". The University provided the Tribunal with the following proposed procedure:

> a) *Representatives of the Crisis Operations Team and CUPE 1975 will be in contact as immediately as possible to discuss: the nature of the emergency, impact(s) of the emergency and the need(s) to manage the emergency (including resources, positions, incumbents);*
> b) *In the event that the existing complement of out of scope, essential, and on-call staff are not sufficient to address the emergency, the representatives of the Crisis Operations Team and CUPE 1975 will arrange for redeployment of the necessary resources and employees; and*
> c) *The parties will debrief within 24 hours to discuss plans to prevent like emergencies during the work stoppage.*

[68] CUPE argues that it should have the right to assess whether there really is an emergency before it is required to provide employees to assist in managing the emergency. The Tribunal is of the view that CUPE's proposal would be unworkable, and adopts the University's proposal. The employees must perform the work as directed. If CUPE is of the view that the situation was not in fact an emergency, that issue can be addressed by the parties later.

[69] This was a particularly challenging case, given that it is the first to interpret Part VII of the Act, and that the parties were unable to agree on any designations prior to engaging the Tribunal. The Tribunal thanks the parties for the significant amount of evidence and comprehensive oral and written arguments they provided. The Tribunal has found all of it to be very helpful.

DATED at Regina, Saskatchewan this **27th** day of **June, 2019**.

ESSENTIAL SERVICES TRIBUNAL

Susan C. Amrud, Q.C.
Chairperson

Appendix A to Decision of Essential Services Tribunal

College of Arts & Science

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
Chemistry	Storekeeper	1		Thorvaldson Building	- Instruct staff and students on safe dispensing of dangerous chemicals and chemical waste - Arrange for safe disposal of chemical waste - Ensure chemical stock is properly rotated

College of Dentistry

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
College of Dentistry	Dental Assistant	3		Saskatoon West Dental Clinic RUH Dental Clinic Dental Clinic Building	Provide chairside support to students, staff and faculty in dental procedures

College of Medicine

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
West Winds Health Center	Clerical/Reception	1		West Winds Primary Health Care	Reception duties
	Medical Office Assistant	2		West Winds Primary Health Care	- Clean exam and treatment rooms - Sample collection - ECGs - Blood pressure measurements - Assist physicians, residents and nurses during patient exams / treatments
Department of Surgery					
Surgery (Neurosurgery)	Clerical	1		RUH	Schedule appointments, tests, surgeries and admissions
Surgery (General)	Clerical	1		RUH	Schedule appointments, tests, surgeries and admissions
Surgery (Orthopedic)	Clerical	1		RUH	Schedule appointments, tests, surgeries and admissions

Surgery (Transplant)	Clerical	1		RUH	Schedule appointments, tests, surgeries and admissions
Pediatrics	Medical Office Assistant	1		RUH	- Assist physicians, residents and medical students during patient exams and treatments - Perform sample collections, examinations and patient testing

Connection Point

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
Data Processing Team	Coordinator	1		U of S Campus and Facilities	All duties required to ensure accurate and timely payroll and disability and benefits payments are maintained
	Administrator	1		U of S Campus and Facilities	All duties required to ensure accurate and timely payroll and disability and benefits payments are maintained

Consumer Services

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
Protective Services	Platoon Member	6		U of S Campus and Facilities	All duties
	Dispatcher	1		Protective Services Dispatch Area	All duties
Residence Services	Custodial	2		U of S Residence Buildings	Maintain cleanliness of entrances, washrooms, laundry and children's play area in residences
	Maintenance		1	U of S Residence Buildings	See paragraph [66] of Reasons for Decision

Facilities

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
Custodial Operations	Custodian	6		U of S Campus and Facilities (bathrooms), WCVM, Dental Clinic, USSU Student Wellness Centre, Health Sciences Student Centre, University Daycares, VIDO / Intervac	- Basic bathroom upkeep campus-wide - Essential cleaning in designated locations to maintain health and safety of humans
Heating Plant	Boiler Operator	3		Central Heating Plant Satellite Heating Plants	All duties

	Engineer	2		Central Heating Plant Satellite Heating Plants	All duties
Reactive Services	Controls Technician	1	1	U of S Campus and Facilities	- All duties - See paragraph [66] of Reasons for Decision for Call-in
	Maintenance	1	1	U of S Campus and Facilities	- Essential work required to maintain health and safety of humans - See paragraph [66] of Reasons for Decision for Call-in
	Millwright	1	1	U of S Campus and Facilities	- Essential work required to maintain health and safety of humans - See paragraph [66] of Reasons for Decision for Call-in
	Steam Fitter	1	1	U of S Campus and Facilities	- Essential work required to maintain health and safety of humans - See paragraph [66] of Reasons for Decision for Call-in
Lockshop	Locksmith		1	U of S Campus and Facilities	See paragraph [66] of Reasons for Decision

Institutional Planning & Design

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
Institutional Planning & Design	Draftsperson		1	U of S Campus and Facilities	See paragraph [66] of Reasons for Decision

People & Resources

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
Safety Resources					
Environmental Protection	Technician	1		U of S Campus and Facilities	- Remove, transport, sort and store chemical, biological and radioactive waste - Respond to chemical, biological or radioactive spills

Teaching, Learning, and Student Experience

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
Student Wellness Centre	Senior Clerical Assistant	0.5		SWC - Place Riel	- Book appointments - Maintain patient records - Intake and triage of patients for SWC and SAO
	Clerical Assistant	0.5		SWC - Place Riel	- Book appointments - Transcribe dictation from medical professionals - Maintain referral system
	Medical Office Assistant	1		SWC - Place Riel	- Sterilize medical instruments - Collect and test urine samples - ECG testing - Assist physicians and nurses in direct patient care

Western College of Veterinary Medicine

Unit/Department	Job Title / Classification	Essential	Call-in	Location	Services
Veterinary Pathology	Technician	0.5		WCVM (Veterinary Pathology Unit)	- Oversee chemical inventories, MSDS regulations and waste management - Shipping and handling of laboratory dangerous goods