Merit Nova Scotia Submission on Bill 19: An Act to Amend Chapter 475 of the Revised Statutes, 1989, the Trade Union Act

Good afternoon, Honourable committee members:

Thank you for the opportunity to present Merit Nova Scotia's position on Bill 19: An Act to Amend Chapter 475 of the Revised Statutes, 1989, the Trade Union Act.

For 20 years, Merit Nova Scotia has served small and medium-sized open shop (or union free) contractors seeking fair opportunities to compete and do business in Nova Scotia. Merit's growing membership consists of 150 companies in Nova Scotia and approximately 3,500 companies across Canada. We represent 2,500 employees in Nova Scotia and approximately 60,000 nationally in many different segments of the construction industry.

Merit Nova Scotia proudly encourages open competition and a free-market approach that awards contracts based solely on merit, regardless of labour affiliation. In other words, we support collective bargaining and the rights of employers and unions to negotiate in good faith.

Much like trade unions who believe in collectively organizing, our members believe they have the freedom to be union free, which includes the choice to hire and invest in their employees; the choice to provide fair wages and benefits; and the choice to bid on projects and deliver quality craftsmanship to every job they perform.

On to the legislation.

Merit Nova Scotia supports this legislation. While we are officially on the record calling for full repeal, and still believe in principle this law should be repealed, we also respect the democratic process of an elected government's right to implement the changes it sees fit.

Merit's initial contention with this legislation is that it was a "solution in search of a problem." We heard from employers inside and outside of the construction industry say very clearly that FCA was simply a tool that allowed unions to wait out an employer. This is why we agree with government's decision to remove the 120-day "clock", which to quote from today's editorial in the Chronicle Herald, "created a perverse incentive to drag out talks and make the [Labour] board write the contract."

It doesn't take a labour relations expert to know that if the primary goal of collective bargaining is to reach a fair and equitable contract, then having a group arbitrarily impose a contract is not healthy for the business relationship. The last thing we need is board officials with no knowledge of the business making life altering decisions.

With this impediment now out of the way, the following is a summary of the potential issues from an employers' perspective and possible ways in which Bill 19 can be improved.

With government intent on modifying FCA, we believe the best scenario for employers would be that FCA would only be triggered if there was a contravention of s. 35(a) of the Trade Union Act (TUA), namely if one of the parties failed "to make every reasonable effort to conclude and sign a collective agreement."

Similar to the Ontario legislation, Bill 19 does not require that the Labour Board be satisfied that collective bargaining has failed as a result of the following criteria; rather it only has to **appear** to the Board that collective bargaining has failed as a result of:

(i) "the refusal of the employer to recognize the bargaining authority of the bargaining agent";

(ii) "the uncompromising nature of any bargaining position adopted by the other party without reasonable justification";

(iii) "the failure of the other party to make reasonable or expeditious efforts to conclude a collective agreement."

(iv) "any other reason the Board considers relevant."

We believe the word "appears" imposes a low evidentiary threshold. Accordingly, it would be preferable if the language in s.40A(5)(c) was changed from "it **appears** to the Board that the process of collective bargaining has been unsuccessful because of..." to "the Board is **satisfied** that the process of collective bargaining has been unsuccessful because of..."

With respect to the criteria for the triggering of FCA in s.40A(5)(c)(i),(ii),(iii), and (iv), we are of the opinion that the following changes would be helpful to employers:

Section 40A(5)(c)(ii) "the uncompromising nature of any bargaining position adopted by the other party without reasonable justification" should clearly stipulate that the Labour Board must consider what is a reasonable justification from a business perspective.

One possible solution to this problem is to insert the word "business" in "reasonable [business] justification." This may require some further changes given that 40A(5)(c)(ii) is not specifically directed at employers. This increases the likelihood of the Labour Board considering business interests when interpreting this subsection.

Section 40A(5)(c)(iv) which states "any other reason the Board considers relevant…" should be removed.

We believe the open ended criteria is problematic because it gives the Board broad discretion. We know that the Labour Board has not been afraid to engage in which what can fairly be described as "Labour Board activism." For example, the Board's decision in *Egg Films* is arguably an example of Labour Board activism where it ignored its past interpretation of the TUA because the application of such an interpretation would have resulted in a denial of unionization.

We recommend the deletion of this "catchall" subsection.

The criteria in (i) – (iii) are broad enough and do not require a catchall that could be used by a Labour Board that has a tendency to engage in "Labour Board activism."

It would be preferable if Bill 19 made explicit that the parties be given the opportunity to make submissions and present evidence in a hearing as to whether the criteria in s.40A(5)(c)(i)-(iv) is satisfied. Language similar to that which is in Section 40A(9) would be helpful:

> *The Board shall give the parties an opportunity to present evidence and make representations.*

The Board would likely provide the parties with some opportunity to make submissions to comply with the principles of natural justice (a legal principle that is also commonly referred to as "procedural fairness" or "due process"), but given the tight timeline (i.e. 30 days from the date of the application) and the low evidentiary threshold (i.e. appears), one could foresee the Labour Board limiting the hearing process.

Holding a hearing and making a decision as to whether the FCA triggering criteria is satisfied within 30 days is a short time frame and therefore, if possible, should be lengthened to 60 days.

These are our submissions. Again, we agree with the legislation but also feel these changes would be beneficial to balancing the process.

As Leader of the Official Opposition in 2011, Premier McNeil said, and I quote: "I think one of the things that's missing in this entire debate is that employees have the right to certify, and we, as Nova Scotians, should respect that. But by the same token, employers have the right to define how they're going to run their operation and their business."

We couldn't agree more. That's what we are asking for today.

Honourable committee members, I thank you for listening to my presentation. I am happy to answer any questions you may have.