MERIT
CONTRACTORS ASSOCIATION
SASKATCHEWAN
OPEN SHOP BENEFITS

Hon. Don Morgan
Minister of Labour Relations and Workplace Safety
300 – 1870 Albert Street
REGINA SK S4P 4W1

July 27, 2012

Dear Minister Morgan,

We thank you for the opportunity to comment on the existing labour legislation in Saskatchewan and to provide your department with our views on how new legislation could be more effective in dealing with the issues that arise in the open shop construction industry.

Our submission outlines a number of recommendations that we believe are crucial in making our province more competitive and our industry more productive. Creating an environment that balances the needs of business owners and workers is necessary to ensure that we remain competitive on both a national and global basis.

We would be pleased to discuss any of the recommendations further at your convenience and again appreciate the chance to be heard on this very important initiative.

Sincerely,

Karen Low
Executive Director

www.meritsask.com
#102 - 70 - 17th St. West | Prince Albert, SK, S6V 3X3
Ph: 1-306-764-4380 | Fx: 1-306-764-4390 | Email: info@meritsask.com

# Consultation on the Renewal of Labour Legislation in Saskatchewan

## Submission by
## Merit Contractors Association of Saskatchewan

MERIT
CONTRACTORS ASSOCIATION
SASKATCHEWAN
OPEN SHOP BENEFITS

**July 27, 2012**

***Submitted to***

***Hon Don Morgan, Minister of Labour Relations and Workplace Safety***

# EXECUTIVE SUMMARY

As an association of open shop construction companies, Merit Contractors Association takes deep interest in the issue of updating and streamlining the labour legislation of the province. This legislation impacts on our members' ability to operate on a daily basis, as well as ensures the rights of all employees in our sector.

In general terms, Merit supports the idea of combining certain pieces of legislation, especially the Labour Standards Act, the Trade Union Act, and the Construction Industry Labour Relations Act. Combining legislation would mean that there would be one source of reference for employers, and one set of adjudicators to resolve disputes. A more stream-lined system facilitates a more productive business environment.

Recommendations on certain aspects of the individual pieces of legislation are summarized as follows:

**Labour Standards Act**

- Amend Part I of *The Labour Standards Act* to exclude the need for a permit in the construction industry if the employer and the employee enter into an arrangement which involves no more than 80 hours of work in a two week period without the payment of overtime
- Remove from Part I application employees' covered by global contracts and employees who receive greater than $55,000.00 in salary income.
- Amend *The Labour Standards Act* to exclude construction completely from the need for group termination notice
- Provide for mitigation requirements under labour standards notice.

**Trade Union Act**

- Create a provision under general trade union rules that would apply to construction companies under *The Construction Industry Labour Relations Act* as well as the *Trade Union Act* that allows for the cancellation of the Certificate if a business closes and does not operate for three years or more.
- Clarify subsection 18(3) on the non application to any subcontractor
- Remove section 18 subsections (5) and (6) to allow the normal rules of common employer to apply.
- Increase the quorum for a certification vote to 75%
- A tie vote on a decertification would mean that the union no longer has majority support and is therefore decertified
- Allow for decertification application beginning two months before an agreement ends until a new contract is negotiated.
- Allow for an open period of 2 months following any major occurrence within the company with respect to certification activity.
- Create an unfair labour practice offence for salting an employer's workforce.
- Provide for a rule on secondary picketing by legislation so that unions cannot disrupt individuals or businesses not directly involved in the dispute
- Remove all of section 36 from the *Trade Union Act* except section 36(3) to allow employees freedom of association without removing the need for employees to pay union dues uniformly required of all members, even if they choose not to join the organization.

- Remove the right to fine up to an employee's wage and leave that issue to the common law or as an alternative place the common law rule on fines under the *Act*.
- Provide that collective bargaining units entered into between employers and their employees be continued for their term on a union raid.
- Upon certification provide that the collective bargaining agreement already negotiated by the Building Trade Union not apply to any contract that was bid and begun prior to the grant of certification, unless the union and the employer agree otherwise.
- Clarify the rules under *The Construction Industry Labour Relations Act* provision to indicate that if a project agreement is negotiated which requires non-union contractors to work under provincial collective bargaining agreements for that project, that under any certification application made the certification order would only be for the site unless the majority of employees not working on that site support the union's certification.

**Employment Agencies Act**

- Repeal the *Employment Agencies Act*.

**Essential Services Legislation**

- Ensure that any legislation created allows for essential services to be provided to all citizens of Saskatchewan.

**Occupational Health and Safety Act**

- Amend the *Occupational Health and Safety Act* to remove harassment from the *Act* and place it under a general labour requirement.
- Clarify the *Act* to provide that the rules of mitigation apply to any order made for monetary loss.
- Adjudicators should be appointed from the approved list of arbitrators under the *Trade Union Act*.

# INTRODUCTION

The following document is a response to the request for consultation on the renewal of labour legislation in Saskatchewan. Our submission is generally related to the interests and needs of Merit Contractors in Saskatchewan. Merit Contractors is an association of open shop construction contractors that, in general, are not unionized. We wish to ensure that we have opportunities for business in Saskatchewan and that the rules that we operate under are fair and balanced as it relates to labour relations. It is our hope that Saskatchewan labour legislation can provide fairness to both workers and businesses in the province. With these goals in mind we will comment on the legislation, both in general and specific terms.

Construction businesses, in order to be successful, require employees who are able to perform the services for the company. In return, businesses pay fair and reasonable wages and provide fair and reasonable benefits to the workers. Given that the economy changes from time to time, it is essential that the labour legislation recognizes and provides businesses with the flexibility to react to changing conditions. It is only through a fair and competitive market place that there is continued success for businesses in the Province of Saskatchewan. Labour legislation should accommodate these goals.

It is essential to recognize that the construction industry is unique. Given that work is obtained through bids to project owners and that the work is of a duration only necessary to complete the project, the kind of employment and labour relations rules that apply should be different from more traditional businesses such as manufacturing, mining, or retail. Each project that a contractor bids has different terms and conditions, depending on the market and the needs of the client. Time deadlines, restrictions on who can occupy construction sites, unpredictability of the weather, and sub-contractor schedules create an environment that requires a great deal of flexibility. Therefore, the rules that may be beneficial and non-problematic for other types of business become more concerning to contractors.

Throughout this submission, we will comment on some of the questions raised in the consultation paper that apply specifically to the industry. We will also comment on areas of general concern to our members. As Merit Contractors represents non-union contractors, it is our hope that legislation would not limit access to business opportunities. Furthermore, It is also our hope that the realities of the business can be considered in any legislation that is to be made to apply to construction businesses.

# GENERAL COMMENTS

**Combining Legislation**

Before commenting on specifics of legislation, it is also important that we comment on our position regarding combining legislation. Because construction companies are covered by general labour legislation and specific legislation under *The Construction Industry Labour Relations Act* and *The Trade Union Act*, it is our position that at a minimum those three pieces of legislation should be combined into one Act to provide the industry with an ability to review the legislation in one place, rather than having to proceed to different pieces of legislation to determine the rules that will apply to them. A combination of the legislation also would provide some degree of consistency in interpreting and applying labour legislation as complaints and decisions would be handled by the mechanisms under the one legislative authority as opposed to a number of authorities. In this way as well a non-union contractor that becomes unionized would be able to refer to the same Act to determine what the minimum standards would be, what the new rules would be under the unionization, and where they proceed if they have disputes under either legislative scheme.

It would also be our hope that occupational health and safety could be included under the Act as that is a big part of the operating of contractors. It is our belief, however, that there are many issues under *The Occupational Health and Safety Act*, and therefore this process would create additional difficulty by trying to bring occupational health and safety under the legislation at this time. A great deal of consultation needs to take place on certain aspects of occupational health and safety. We would suggest that the Government should decide if they wish to only include that legislation after separate consultation.

**RECOMMENDATION:**

- **Combine the *Trade Union Act*, *The Construction Industry Labour Relations Act* and *The Labour Standards Act* under one Act. If possible, also include the *Occupational Health and Safety Act* under such legislation.**

# RECOMMENDATIONS – LEGISLATIVE CHANGES

## A. General Labour Law

We will first comment on the specific areas that are essential to our industry under general labour law and then comment on issues relating to *The Trade Union Act* and *The Construction Industry Labour Relations Act*, the *Essential Services Act* and the *Occupational Health and Safety Act*.

### 1. Hours of Work - Permits

The most important area for the construction industry is the question of how construction projects are handled under the hours of work and overtime provisions of *The Labour Standards Act*. The construction industry has unique needs when dealing with the construction and completion of a project over a specified and limited time. There are many types of employment arrangements that are beneficial to both the contractor and the employee during the project. It is imperative, therefore, that as much as possible the arrangement that would work for a particular project be left to the negotiation between the company and the employee. In many cases, the employees are travelling from their homes in or outside of Saskatchewan to go to a construction project and they may wish to have scheduling arrangements that provide them flexibility to work long days while away from home in order to shorten their time on the site.

The problem with the present legislation is that for scheduling such arrangements, permits are required. Consequently, permits may be different for every project. Also, permits are time consuming and wasteful. We do not dispute that permits may be useful for other industries where there is some certainty and predictability of the hour worked. However, for Merit Contractors, a project may be quite short in duration and applying for and obtaining a permit may be virtually impossible for a particular job.

With the above in mind we note that there are exemptions to the need for permits under the Act at the present time. We would suggest that there be an additional exemption to Part I that would provide where an employer and individual employees enter into a work arrangement in the construction industry that provides for averaging of hours as long as the averaging in such agreement does not involve working more than 80 hours in a two week period without the payment of overtime. If both the employer and the employee can agree to the hours of work and overtime for the limited exemption that is being requested, it would appear that it is a waste of the department's time and effort to review permit applications in these circumstances. The *Act* should therefore add in an exclusion on the need for permits for the construction industry provided the above rules on averaging over a two week period are met.

We would also suggest that Part I of *The Labour Standards Act* exclude from its operation salaried employees covered by global contracts working for the business. In construction, a number of people perform services that are covered by employment contracts where the employee knows that there will be busier times of the year than others. At the busy times they may work longer hours but in non-busy times they will work less hours. The company will still pay them a fixed salary per month regardless of the hours they work in that period of time provided the employee agrees that the pay includes work for all hours of work at the busy and non-busy times. Such global contracts have been in use in the construction industry for a substantial period of time and should be recognized as legitimate provided there are written agreements between the business and the employee that specifically provide for the payment to cover regular hours, overtime hours and other hours specifically covered by the contract.

In addition to exclusion of global contracts from Part I, we would suggest that there be an exclusion from Part I totally for certain employees in an organization. If the employment contract provides for wages of $55,000.00 or higher Part I of the *Act* should not apply. We have chosen $55,000.00 as it appears to be the maximum wage benefit for WCB. It is also the figure used by the federal government as it relates to employment benefits. It would appear that once an employee is earning substantially more than minimum wage that the rigid rules of Part I of *The Labour Standards Act* would not need to apply to them.

**RECOMMENDATIONS:**

- **Amend Part I of The Labour Standards Act to exclude the need for a permit in the construction industry if the employer and the employee enter into an arrangement which involves no more than 80 hours of work in a two week period without the payment of overtime**
- **Remove from Part I application employees covered by global contracts and employees who receive greater than $55,000.00 in salary income.**

**2. Lay Off – General and Group Terminations**

Because of the unpredictability of a construction company's business, it is also our position that the rules relating to layoff under *The Labour Standards Act* should be modified. It would make the most sense for the regulations to simply exempt the construction industry from the notice of group termination provisions under the Act. This would recognize the reality of the construction industry and the variability of employment for workers in that industry. There should be no need to provide an additional notice other than a notice of layoff as required by the Act when the employees working for construction companies are aware that their employment with a project comes to an end, unless of course the employer obtains more work at a different location. There should be no need to advise the Government or provide additional notice other than the notice normally given for layoffs in these circumstances.

With regard to the notice of layoff itself, given the uncertainties of construction projects, we would suggest that *The Labour Standards Act* provide that if an employer provides notice but the employees are not given enough notice so they can work out the notice period that the normal rules of mitigation would apply for the balance of the notice period. Therefore, if an employee finds other work immediately at the same rate of pay and benefits as the employer has provided, there should be no claim for pay under the Act.

**RECOMMENDATIONS:**

- **Amend *The Labour Standards Act* to exclude construction completely from the need for group termination notice**
- **Provide for mitigation requirements under labour standards notice.**

## B. The Trade Union Act and The Construction Industry Labour Relations Act

### 1. Non-Active Businesses

As Merit Contractors' employers are, generally speaking, non-union, it is necessary that the rules as they relate to the application of the building trade or alternate unions be clarified at this time.

We would suggest that if a business ceased to operate for three years that the certification that applied to that business end by application of the employer or the trade union. This "three year and out" rule has been in Alberta legislation for some time and would provide fairness for both the contractor and any workers that they would subsequently hire if they returned as a business and began operating. It would make sense that if the employer closed its business and laid off and paid severance to the workers, then when it returned after 3 years that workers hired at that time would determine whether they wished to be represented by any particular union or no union at all.

Old certifications should not be used without retesting whether the workers want to be unionized. The principle of "three years and out" should apply to not only construction businesses but to all businesses in Saskatchewan and should be contained in *The Trade Union Act* as it relates to enforcement of certification orders. No unionized business that closes down and honours the terms of its collective agreement on the date of its closure and ceases to do business in the Province of Saskatchewan for three years or more should have the old certification apply to it.

The above change would not affect the union's right to make a claim against any other business that is being operated by that employer in that three year period under the provisions of *The Construction Industry Labour Relations Act* or *The Trade Union Act* relating to successorship or common employer.

**RECOMMENDATION:**

- **Create a provision under general trade union rules that would apply to construction companies under *The Construction Industry Labour Relations Act* as well as the *Trade Union Act* that allows for the cancellation of the Certificate if a business closes and does not operate for three years or more.**

### 2. Common Employer

The section on common employer in *The Construction Industry Labour Relations Act* needs clarification to ensure that common employer legislation is dealt with in a manner that is both fair to the contractor and in accordance with the provisions of general law in Canada. When Section 18 was placed into the *Act*, subsection (3) provided for an exemption from common employer rules if a non-union general contractor performed work through a unionized subsidiary. Because that is unclear in its application to a number of businesses, the Board should ensure that you cannot use common employer legislation to certify a general contractor simply because they subcontract work to any unionized business on a project whether that company may, for purposes of the *Act*, be considered to be a common employer under 18(1) or not. A change to the legislation to state that no subcontract could be used to certify the contractor under common employer would clarify that section.

In addition, the general law on common employer suggests that the union could not use common employer legislation to expand its certification but merely to preserve it. Therefore, if a labour relations board finds that the union is attempting to expand its certification rights by an application under common employer legislation, it would dismiss the application. We would suggest that subsections (5) and (6) of Section 18 of *The Construction Industry Labour Relations Act* be repealed so that it is clear that all of the normal rules under common employer would apply.

**RECOMMENDATION:**

- **Clarify subsection 18(3) on the non application to any subcontractor**
- **Remove section 18 subsections (5) and (6) to allow the normal rules of common employer to apply.**

### 3. Certification

With regard to becoming unionized, Merit Contractors feels that the voting procedure under the *Act* should be strengthened to indicate that a quorum of people required from a voter's list of those eligible to make the determination be increased to 75%. Of that 75%, at least 50% plus one must support the union. Our concern is that if a company is to be unionized there should be genuine support for the certification by the employees working for the company at the time the application is filed. It would be possible to argue, perhaps strongly, that if employees don't turn out for the vote that they have no desire in becoming unionized and therefore their vote should be counted as a no. An alternative and our compromise is to increase the amount of quorum to 75% and still require a 50% plus one support for the union before a company becomes unionized.

**RECOMMENDATION:**

- **Increase the quorum for a certification vote to 75%**

### 4. Decertification

The law on decertification has changed relating to the numbers required to decertify a union. Because a certified union is required to demonstrate majority support in order to bargain on behalf of the employees, case law interpreting the *Act* provided that if a decertification vote was tied, the union no longer has majority support and therefore should be decertified. After there was a change in government and board, the Labour Relations Board with the same legislation changed the rule to indicate that on a tie vote the union still would maintain the right to bargain, even though they did not have majority support. We would suggest that the law be clarified to indicate that on a decertification vote where the union does not have majority support, the decertification would be granted.

In addition, there should be an additional open period beginning 2 months before the expiry of the agreement before the new agreement is reached, and an open period of 2 months following any major occurrence within the company with respect to certification activity.

**RECOMMENDATION:**

- **A tie vote on a decertification would mean that the union no longer has majority support and is therefore decertified**
- **Allow for decertification application beginning two months before an agreement ends until a new contract is negotiated.**
- **Allow for an open period of 2 months following any major occurrence within the company with respect to certification activity.**

### 5. Union Salting

A practice has developed with unions where they encourage a union member to work for a non-union contractor with the purpose of certifying the non-union contractor. The employee has no desire to be a long term employee of the contractor and is there only to try to precipitate certification of the contractor. Merit Contractors rely heavily on their employees for commitment to the company. Legislation creating an unfair labour practice for a union to relieve a member of their obligations under the union constitution solely for the purpose of certifying a non-union contractor, when there is no intention on the employee's part to continue with that contractor after the certification would be appropriate.

**RECOMMENDATION:**

- **Create an unfair labour practice offence for salting an employer's workforce.**

### 6. Picketing

It is our position that *The Trade Union Act* be amended to provide that unions who are on strike, whether they are construction unions or not, should not be able to picket job sites or managers' or other workers' homes or other private places. Saskatchewan requires a definition of picketing to restrict secondary picketing. As contractors that are not unionized, we would not have an ability to settle the dispute and therefore such picketing should be unlawful.

**RECOMMENDATION:**

- **Provide for a rule on secondary picketing by legislation so that unions cannot disrupt individuals or businesses not directly involved in the dispute**

## 7. Union Security and Fines

One of the basic tenants of our association is freedom of choice. Therefore, we would support any government action that relates to progressive laws on protecting the rights of all employees to make choices, the right to decide if they want to belong to an organization, and the conditions and amounts of dues to be paid to that organization. We believe that any organization in Saskatchewan requires transparency, and fairness should be applied to unions just as it is to all businesses. The limits of those rights and obligations, however, are best left to the Government, employees and the representative organizations.

We would suggest that, as a minimum, government-imposed union membership under section 36 of the *Trade Union Act*, which does not exist to our knowledge in other western provinces, should be removed in its entirety. In addition, employee rights to work during a labour dispute, which is now permitted, should not be dealt with by government legislation, but by ordinary contract law. Therefore, section 36 of the *Trade Union Act*, except for 36(3), which protects employees' rights to choose, should be removed in its entirety from the *Trade Union Act*.

**RECOMMENDATION:**

- **Remove all of section 36 from the *Trade Union Act* except section 36(3) to allow employees freedom of association without removing the need for employees to pay union dues uniformly required of all members, even if they choose not to join the organization.**
- **Remove the right to fine up to an employee's wage and leave that issue to the common law or as an alternative place the common law rule on fines under the *Act*.**

## 8. Application of Contracts on Certification or Raids

It is also important that if a contractor becomes unionized in Saskatchewan that their rights to complete projects that they have bid on at the time of certification not be affected by the certification unless a new agreement is entered into between the employer and the trade union regarding that project. Therefore, an employer who is a Merit Contractor should not automatically have any collective agreement apply to it on certification as that would be unfair to the contractor who has bid the project based upon its status as a non-union contractor at the time. Only in construction can an agreement apply to a contractor without its ability to negotiate its rates of pay and other working conditions prior to the time that they become effective. It should be noted that many builders' trade unions, when certifying new contractors, exclude from the collective agreement projects that began before the certification took place. That should be made part of the law so that all employers are treated fairly and equally when certifications occur.

**RECOMMENDATION:**

- **Provide that collective bargaining units entered into between employers and their employees be continued for their term on a union raid.**
- **Upon certification provide that the collective bargaining agreement already negotiated by the Building Trade Union not apply to any contract that was bid and begun prior to the grant of certification, unless the union and the employer agree otherwise.**

Clarity to the law relating to project certification is required. In the construction industry, some projects are negotiated between the owner, a general contractor and the building trade unions to be a project completed by building trade union rules. If such has been decided, it is our concern that open shop contractors will be excluded from those projects because they are non-union and would not want to have all of their projects unionized as a result of working on a closed site. The legislation should be made clear that if a project agreement is negotiated and an application for certification is received relating to a contractor working on that site that a project certification only could be granted to the union for workers working on that site. In order for the certification to apply beyond the site, the majority of the employees not working on that site would be required to demonstrate support for the union. The two groups would be counted separately in order to avoid a greater certification than the project unless a majority of the other workers are in favor.

**RECOMMENDATION:**

- **Clarify the rules under *The Construction Industry Labour Relations Act* provision to indicate that if a project agreement is negotiated which requires non-union contractors to work under provincial collective bargaining agreements for that project, that under any certification application made the certification order would only be for the site unless the majority of employees not working on that site support the union's certification.**

## C. Other Legislation

### 1. Employment Agencies Act

Our position on employment agencies is such that we feel that the only area in which employment agencies would be relevant in today's society relates to foreign workers. Foreign workers are regulated under the *Immigration Act* federally and it should not be necessary to have additional rules in the Province of Saskatchewan. Merit Contractors feels we need less regulation when dealing with the ability of businesses to operate in Saskatchewan and that this old *Act* should be repealed.

**Recommendations:**

**RECOMMENDATION:**

- **Repeal the *Employment Agencies Act*.**

### 2. Essential Services

Questions have been raised about essential services legislation. It is our position that it is important for the Government of Saskatchewan to have legislation that relates to the essential services that are provided to every business and worker in Saskatchewan involved in the construction industry. It is also important that those services are not disrupted by a labour dispute. We support essential services legislation but feel that the particulars of the legislation and its working to ensure that the public is safe and properly serviced

would be best left to those who provide the service and the Government. We rely on the Government to take appropriate action to ensure that the services continue to be provided in a meaningful way for the public of Saskatchewan.

**RECOMMENDATION:**

- **Ensure that any legislation created allows for essential services to be provided to all citizens of Saskatchewan.**

### 3. Occupational Health and Safety

Earlier in this submission we made general comments on Occupational Health and Safety. At this point we feel that three matters need immediate action. The first is the removal of Harassment from the *Act* and its placement in the general *Labour Act* so that no findings are made until there is a hearing with all parties. The same penalties could be made without the need for Occupational Health and Safety officers making advance rulings on matters that require rules of natural justice and findings based on whether the complaint falls under the *Act* without hearing evidence and allowing for cross examination on the evidence.

The second change relates to reinstatement rights under the *Act*. It should be made clear that the rules of mitigation apply to any order made for monetary loss under the *Act*.

The third change is that all adjudication should be made to arbitrators on the approved list of arbitrators under the *Trade Union Act*.

**RECOMMENDATION:**

- **Amend the *Occupational Health and Safety Act* to remove harassment from the *Act* and place it under a general labour requirement.**
- **Clarify the *Act* to provide that the rules of mitigation apply to any order made for monetary loss.**
- **Adjudicators should be appointed from the approved list of arbitrators under the *Trade Union Act*.**

# CONCLUDING REMARKS

In conclusion, Merit Contractors Association believes that this review of existing labour legislation is a tremendous opportunity for the people of Saskatchewan to have an impact on how our business environment will evolve in the coming years.

We have laid out very practical concerns with many of the laws, rules and regulations as they exist today. For whatever reason those rules may have made sense at one time and they may have been well intended, but in many cases we believe they do not fit the Saskatchewan of today. We further believe we have made the case for commonsense change that maintains important protections for workers while adding the flexibility that benefits contractors, consumers and investors.

We look forward to continuing this discussion with the Government of Saskatchewan and as always would be pleased to answer any questions that you might have.

Merit Contractors
Per:

Karen Low, Executive Director