



**OSTA Response to the Proposed Regulation Respecting
Trade Classification Panels Under the *Ontario College of
Trades and Apprenticeship Act, 2009***

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Proposal # 17-MOL006 – OSTA Response to the Proposed Regulation Respecting Trade Classification Panels Under the *Ontario College of Trades and Apprenticeship Act, 2009*

On behalf of the members of the Ontario Skilled Trades Alliance (OSTA) we are pleased to provide the following response to the proposed *Regulation Respecting Trade Classification Panels Under the Ontario College of Trades and Apprenticeship Act, 2009* (Ministry Regulation).

Founded in 2011, the OSTA is a coalition formed to deliver to government and affiliated parties a consensus opinion of employers on matters relating to the skilled trades, including the Ontario College of Trades (OCOT). The members of OSTA represent nearly 8,000 employers, employing approximately 130,000 tradespeople, in both the unionized and non-unionized sectors of the construction, service, and motive power industries across the province.

Since its foundation, the OSTA has had a very keen interest in the trade classification review (TCR) process given its potential to substantially alter that labour market for tradespeople in the province. It is for this reason that we have prepared the following response, including suggested revisions to meet the recommendations made by Tony Dean in his report, *Supporting a Strong and Sustainable Ontario College of Trades* (Dean Report).

General Comment

The OCOT is at a critical juncture. The outcomes of the current regulatory consultations and relaunching of the TCR process will shape the long-term industry views of, and confidence in, this institution. The trade classification referral and review process has long-been a primary point of contention between the OCOT and the members of the OSTA, due to the inherent system bias. Given that the OCOT governs and is funded exclusively by compulsory certified tradespeople, we believe that, in the past, the OCOT viewed the expansion of compulsory certification favourably to further its own institutional interests.

The Dean Report sought to remedy these problems by establishing a clear and concise roadmap for OCOT to follow to become a balanced and impartial governance body for the skilled trades, as it was originally intended to be. It must not be forgotten that the content of the Dean Report was driven by extensive consultations with stakeholders of the OCOT. It was not one person's view, but rather the voice of those with a significant



interest in the OCOT and its functions. The Dean Report identified the systemic problems with the OCOT and sought to repair them by enhancing accountability and transparency. It represented an opportunity for a “restart.” This is something that the members of the OSTA welcomed. While the present draft of the OCOT *Board of Governors Regulation on Trade Classification Review Referral Process* appears to veer away from Dean’s recommendations and leaves much to be desired, we believe the proposed changes in the Ministry Regulation, for the most part, have embraced the accountability and transparency needed in the process.

OSTA would like to commend the Ministry of Labour (MOL) for its consideration of the Dean Report when drafting the Ministry Regulation. The spirit of the Dean Report was clearly embraced and adopted in many of the proposed changes to the TCR process, meaning that the MOL took serious the need to reform to establish a more clear and transparent process to certify and de-certify trades.

Below, we provide comments and recommendations for changes to the regulatory proposal that will help to solidify and enshrine the evidence-based approach that Dean sought to have implemented based on his recommendations. By moving forward with these minor revisions, we believe that industry stakeholders will have much greater confidence in the process that is being laid out to review and consider modifying the classification of an existing trade.

‘Invitation’ to make Written and Oral Submissions

(Written Submissions) Sections 3(1) and 3(2) make reference to inviting written submissions. While the intention of this may be referencing an open invitation for comment, a small revision to this language should be made to avoid any interpretation errors for what this actually means.

We recommend that the language be modified to read: “Written submissions in response to an open consultation may be made by any person other than the following...”

(Oral Submissions) Section 4(2)(b) provides that a Classification Panel “may invite” any person to make oral submissions in a TCR process. We believe that oral submissions should be open to whomever would like the opportunity to provide their opinion on the potential reclassification of a trade. Limiting the number of presenters through an invitation-only process gives the impression that the process is seeking to rush decisions through and limit the voices that are to be heard. The TCR process should be a comprehensive consultation given its potential to impact the long-term labour market for a given trade.

We recommend modifying the language to allow for an open opportunity for anyone to make an oral presentation at a TCR hearing.

Regional Reviews to Ensure a Comprehensive Process

The Ministry Regulation needs to emphasize the need for regional consideration, not just during implementation, but also during the consultation phase of a TCR. Consultations need to occur regionally across the province, in Thunder Bay, Sudbury, London, Waterloo, Ottawa and Kingston. It is unfair for the consultation process to be hosted exclusively in Toronto, which will, by default, result in Toronto voices being predominantly heard. It is important that all areas of the province are seen to have an equal opportunity to provide feedback into this process and have the same face-to-face access to decision makers that those in the Greater Toronto Area have. We believe that a regional consultation and review component is so fundamental that it needs to be enshrined in this Ministry Regulation.

Criteria for Making a TCR Determination

Section 6(4)(a) needs to add additional criteria for consideration in the TCR. We believe that three additional sections should be added to the list of items: “...(vi) availability and capacity of training delivery agents; (vii) availability of labour on a regional and province-wide scale; and (viii) anything else the Panel may deem necessary or relevant to make an informed and accurate decision.”

These additions are important, especially (viii) noted above. We believe allowing Panel members to seek additional information to inform the decision-making process is a critical addition to this criteria list, especially given the formal comments issued by the Chair in the Sprinkler and Fire Protection Installer Classification Review decision, where he noted that “the review process explicitly limits review panelists to considering only information that is submitted to them or arises from oral consultations. The process also clearly defines the seven criteria on which the panel must make its decision and limits the decision to those criteria only.”¹ Providing open-ended access for Panel members to consider whatever additional information they deem important to making an informed decision will bring a lot of credibility to this process.

The Onus Must be on the Applicant Trade Board – “They Who Assert, Must Prove”

An additional subsection needs to be added under **Section 6** that clearly identifies that the onus must be on the applicant trade to prove that the proposed classification change is necessary. Indeed, Trade Classification/Reclassification Reviews Recommendation #10 of the Dean Report specifically references this idea by noting “The onus would be on the applicant to provide sufficient supporting evidence for the classification they are seeking or the reclassification of a trade.”²

¹ Bernard Fishbein, Larry Lineham, Robert Bradford, *Review Panel Decision – Trade Classification Review: Sprinkler and Fire Protection Installer*, Ontario College of Trades, Decision Number: TCR2013-1 SFPI, (April 23, 2014), p. 18.

² Tony Dean, *Supporting a Strong and Sustainable Ontario College of Trades: Reviewer’s Report and Recommendations to the Minister of Training, Colleges and Universities*, (Toronto: Queen’s Printer for Ontario, 2015), 14.



The onus on the applicant trade needs to be clearly and definitively referred to in this regulation, rather than merely referred or alluded to. While Schedule 17 of Bill 70 was being discussed, OSTA members were told that the “onus piece” would be included in the regulatory process, and yet neither the draft Ministry or Board Regulation refer to it. We believe the Ministry Regulation is where this reference is best suited.

It cannot be forgotten that the outcome of a TCR will have a significant impact on the legal rights and obligations of the tradespeople and employers engaged in that trade. In this respect, and to be clear, although the determination is made by the Classification Roster and not a judge or Vice Chair at the OLRB, a TCR is a legal proceeding. It is the applicant in a TCR that is seeking to change the status quo that has been in place for decades.

In our submission, as is the case in many forms of legal proceeding, it is essential that the Ministry Regulation clearly state that it is the applicant who bears the onus of establishing that a given trade’s classification must change. The Ministry Regulation must be clear that this onus will only be met with clear and convincing evidence that a change in the status quo is required. Specifically, this would involve clear and convincing evidence that a change in the status quo is required to serve and protect the public interest, and that this cannot be achieved without changing the classification of a trade.

Further support for including a clear statement that the onus is on the applicant is the fact that it’s likely the applicant trade who is in the best position to gather and present all the relevant facts and provide the justifications necessary to demonstrate that it ought to receive the requested trade classification.

Lastly, including this provision in the Regulation will avoid the potential that affected parties will spend time and resources litigating the onus issue when the submissions are being presented to a Classification Panel.

One Review at a Time

The Ministry Regulation needs to enshrine a “one-review-at-a-time” policy to allow this new process to be stress-tested and tweaked where appropriate. It must be remembered that the circumstances will involve a newly-appointed Classification Roster and many interested stakeholders, both with limited time and resources. Further, there will be many stakeholders with an interest in multiple TCRs. A “one-at-a-time” policy therefore is important for three primary reasons:

1. It will allow the OCOT to establish a proper process so that all stakeholders understand and buy-in to a transparent and predictable process. If there will be numerous certification reviews occurring at the same time, we fully anticipate a strong negative reaction to OCOT as was seen in 2013 and 2014. This is not in the best interest of the OCOT, its stakeholders, or the public.

2. Certification reviews by their very nature will impact voluntary and existing compulsory trades through overlap. Two competing trade reviews could produce outcomes that are misaligned and inconsistent. This will only add to the confusion as industry needs to sort out the impacts this will have.
3. Voluntary trades seeking reclassification likely have been preparing for submissions specific to their trade for many years with legal and labour-market analysis, as well as safety statistics, already prepared and ready for their case to be made. Traditionally, groups opposing these applications must be able to respond reactively to each application package. If there are several applications going forward simultaneously, this creates a significant imbalance in resources between the proponents and opponents of certification, and further creates a sense of bias in favour of expansion of compulsory certification.

Affected industries need ample amount of time to consider and respond to these TCRs in a comprehensive manner. And until the process becomes more familiar and systematic, it is unreasonable to expect stakeholders to have to contend with multiple reviews at once.

Language Around Conflict of Interest

A significant hurdle that the OCOT faces when it comes to this referral process is that of credibility. There is an inherent distrust that has developed between the OCOT and many stakeholders due to how previous reviews unfolded. It is critical for the OCOT to establish trust in this referral and review process. All affected stakeholders must recognize this as a legitimate and fair process. As such, clear rules around identifying potential conflicts of interest *prior* to the launch of a referral and review must be included in the Ministry Regulation. This is critical to ensuring confidence in decisions of the OCOT, and its long-term success.

Much of the apprehension that has developed is due to ratio reviews that were conducted prior to the Dean Review, including:

- the Ratio Review Panel that issued the ratio decision for Electrician: Construction and Maintenance; and Electrician: Domestic and Rural. This review was chaired by Mr. Bernard Fishbein. During this review, an employer group advocating for lower apprenticeship ratios became aware that the Chair had previously represented an organized labour group opposing lower ratios in over sixty reported cases before the Ontario Labour Relations Board (OLRB). Despite this close affiliation, the Chair did not disclose this relationship prior to the review. Failing to disclose the conflict created by his extensive ties to this group opposing lower ratios resulted in concerns there was a reasonable apprehension of bias.
- the Ratio Review Panel that issued the ratio decision for Sheet Metal Workers. During the course of this review, an organized labour group requested that an employer-representative panel member, Mr. Phil Besseling, recuse himself or be removed from the review process due to an alleged conflict of interest.



While OSTA has no position on the aforementioned allegations, each case is illuminating in its observations about the shortcomings of OCOT's internal policies concerning conflicts of interest.

The *Ontario College of Trades and Apprenticeship Act, 2009*, references the need for the OCOT Board of Governors to develop conflict of interest rules for members of the Board, Divisional Boards, Trade Boards, and the Roster of Adjudicators (section 73(1)(9)). These conflict of interest rules are laid out in section 10 of the OCOT Consolidated By-Law and provide that members of the Board, Divisional Boards, Trade Boards, and Review Panels shall disclose any conflict of interest they may have in any matter coming before them and shall not participate in the matter.

Due to the fact the By-Laws may not be well-known, it is our submission that inclusion of, or at least reference to, these rules must be included in the Ministry Regulation. Including this type of language will go a long way towards establishing a greater amount of legitimacy and trust in this process.

Additional Changes to Consider

- **Section 3(5)(b)** needs to have an extended timeline, as the proposed 60-day timeline to draft and submit a formal response to a trade classification proposal is not likely be enough time to provide fulsome research and submissions on the enumerated factors, particularly surveys and expert reports. This timeline should be extended to read "...at least 90 days."
- **Section 9** should not include hard timelines on the delivery of a TCR decision. Given the complexity and significant impact on the skilled trades labour force that this decision may have, we recommend allowing a review panel to take as long as it needs to make the decision following the conclusion of the consultation phase of a review.
- The discussed MOL "Trade Profile" documents that will be developed following receipt of a Trade Referral Request package must include a jurisdictional scan for how the trade and mobility of workers operates across Ontario and in other North American jurisdictions, as well as how the trade operates in the different sectors of construction (Residential, ICI, and Civil). It MUST also include a relevant overview of all jurisdictional rulings made by the Ontario Labour Relations Board around the applicant trade's Scope of Practice to ensure that all trade overlaps are accounted for in the review process. These may include jurisdictional dispute decisions, or relevant applications for certification, among others.



OSTA Member Organizations

- Barrie Construction Association
- RESCON
- Durham Region Home Builders' Association
- Ontario Road Builders' Association
- London District Construction Association
- Ontario Formwork Association
- Ontario General Contractors Association
- Heavy Construction Association of Toronto
- Trillium Automobile Dealers Association
- Masonry Contractors' Association of Toronto
- Ottawa Construction Association
- Ontario Hairstylists Association
- Merit Openshop Contractors Association of Ontario
- Progressive Contractors Association of Ontario
- Conestoga Heavy Construction Association
- Durham Region Heavy Contractors Association
- Greater Toronto Sewer and Watermain Construction Association
- Hamilton and District Heavy Contractors Association
- Heavy Construction Association of Regional Niagara
- Kingston Construction Association – Heavy Civil Sector
- London and District Heavy Construction Association
- National Capital Heavy Construction Association
- Ontario Concrete Pipe Association
- Ontario Sewer and Watermain Construction Association
- Sarnia Heavy Construction Association
- Ontario Concrete and Drain Contractors Association
- Residential Tile Contractors Association
- Ontario Electrical League
- Residential Framing Contractors Association of Metropolitan Toronto and Vicinity Inc.
- Ontario Home Builders Association