February 28, 2017

Sent via E-mail (consultations@collegeoftrades.ca)

Mr. Pat Blackwood, Chair of the Board of Governors
Ontario College of Trades
655 Bay St., Suite 600
Toronto, ON M5G 2K4

Dear Mr. Blackwood:

Re: Bill 70 Legislative Amendments Consultation Submission

On behalf of the Ontario Skilled Trades Alliance ("OSTA") we are pleased to provide the following written submission to the Bill 70 Legislative Amendments Consultation ("Consultation") conducted by the Ontario College of Trades ("College").

Ontario Skilled Trades Alliance: Who We Are

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 College. The OSTA represents more than 130,000 tradespeople employed by nearly 8,000 employers, unionized and non-unionized, in the construction, service and motive power sectors.

The OSTA and its members are interested and engaged stakeholders of the College. The OSTA took the opportunity to make both oral and written submissions to Mr. Tony Dean and also to Mr. Chris Bentley. Many OSTA members will also be making separate submissions to this Consultation.

Introduction

Bill 70 is welcome news to stakeholders who, for years, have been advocating and waiting for meaningful change to the College and its processes. And while progress is being made, the OSTA wishes to make its position clear at the outset: there is still significant work to be done, most (if not all) requiring stakeholder input. This includes policy and regulatory work related to the three points identified below. As an engaged stakeholder, the OSTA looks forward to contributing to this important work in a meaningful manner.

The OSTA will address three key topics outlined in the Consultation:

1. Trade Classification Review Referrals
2. Journeyperson to Apprentice Ratios
3. The Compliance and Enforcement Policy

Further, while not the focus of this submission, the OSTA does wish to raise its concerns with the effectiveness of the consultation process employed, and our fear that a rushed process may have a negative impact on the outcome. The OSTA is aware of the tight timelines under which this work must be completed, but notes this is in relation to the creation of a compliance and enforcement policy, not the trade classification process. The OSTA submits that at this stage of implementing Bill 70 amendments, the focus must remain on a compliance and enforcement policy that meets the needs of the public and accomplishes statutory objectives.

In relation to trade classification, the OSTA urges the College to take the time necessary to get the process for referral and classification of a trade right the first time, as the final process will have large implications for the skilled trades system in Ontario, and those who work within it. Again, there is still a significant amount of work to be completed as there are both Board and Minister's Regulations that must be drafted in relation to trade classification. In our submission, this work *must* include consultations with stakeholders. Further, the College and the Ministry of Labour should consider sharing these regulations with key stakeholders *prior* to their finalization and release in order to avoid unforeseen obstacles that may arise when they are in operation.

In this regard, the OSTA notes its continuing interest in contributing to this work, and remains available for consultation on an ongoing basis. The College has an excellent opportunity to engage in meaningful consultation in order to arrive at positive solution-based outcomes for all stakeholders.

1. Trade Classification Review Referrals

It is the role of the Minister of Labour to create a Regulation setting out the classification review process to be followed by the Classification Panel, as well as the criteria that the Panel must consider in making its determination. In this regard, the OSTA notes its general approval of the recommendations made by Tony Dean in his report, *Supporting a Strong and Sustainable Ontario College of Trades* (Dean Report). However, further consultation with knowledgeable stakeholders (including other government entities) is necessary in order to define the contours of the criteria in the recommendations which include demonstrated public interest, economic impact, access to the trade and labour mobility.

The role of the eventual Board Regulation on this matter will be to set the process for referrals and determine what requirements, if any, a trade must meet in order to be referred. Simply put, in order for a trade to be referred, there must be a **demonstrated need** for the classification of a trade to change. This must be established by way of verifiable evidence *before* the trade is referred, and the onus must be on the applicant Trade Board to provide that evidence. On a procedural level, and due to the implications of making an application for compulsory certification, it must be mandatory that all members of a Trade Board participate in the decision of whether or not to apply, with the application moving forward only if 60% or more of members feel it should. These points must be made explicit in the eventual Board Regulation.

a. The HPRAC Model

The model employed by the Health Professions Regulatory Advisory Council (HPRAC) provides a valuable starting point. This model is built on research, evidence and expertise, as

opposed to speculation, and involves a two-step process. The primary criterion under HPRAC is whether the profession seeking regulation poses a risk of harm to the health and safety of the public and whether it is otherwise in the public interest the profession be regulated. The applicant must demonstrate this risk with *relevant and verifiable evidence*. Specifically, an applicant must demonstrate the profession is involved in duties and procedures with significant potential for physical or mental harm to patients and there is a significant potential of risk of harm. It is only once this threshold risk of harm is established with relevant and verifiable evidence that secondary criteria are considered, including whether regulation is the most appropriate and effective means to protect the public.

b. A Pre-Screening Model for the College

The OSTA submits an evidence-focused process similar to that engaged by HPRAC is appropriate for determining whether a trade should be *referred* to a classification panel. The applicant should first have to meet the threshold question that there is a **substantial risk of harm** to the individual performing the work, other workers, or the public. The Applicant should have to address this risk of harm as it relates to each component of the Scope of Practice ("SoP") the applicant seeks to have classified as compulsory and how these risks would be significantly reduced with compulsory certification.

Next, the Applicant must demonstrate the risk cannot be addressed by an **existing regulatory regime**. This will involve consideration of whether other regulation and regulatory bodies (Ministry of Labour enforcement of the *Occupational Health and Safety Act*, for instance) already adequately address the risk of harm referred to by the Applicant. If the risk of harm is accounted for by another regulatory regime, the application for compulsory certification must fail.

It is at this stage there must also be consideration of **system capacity** as it relates to trade classification. The onus on the applicant must include an obligation to establish that compulsory certification is feasible taking into consideration items such as the availability of Training Delivery Agents, required administrative resources for the oversight of the trade and that compulsory classification would not be disruptive to practice in the sector, or to the public generally.

If the applicant establishes there is a significant risk of harm, that is not addressed by existing regulation, and that there is required capacity and resources for the classification, the pre-screening process should then have regard to the **factors recommended in the Dean Report** related to trade classification. Not only is a thorough pre-assessment necessary in order to save the limited time and resources of the College, this pre-assessment must also be rigorous to save the limited time and resources of stakeholders. It is worth noting that this process must apply evenly and equally to trades seeking re-designation from compulsory to voluntary. The process and onus above should be identical, regardless of the applicant's desired outcome.

The question also arises as to who will conduct the pre-assessment of a trade classification application. While this function is the responsibility of the College, the OSTA submits the pre-screening panel must have independence from the College (perhaps in a secretariat). This is due to the simple fact that the College has a perceived conflict of interest as it benefits financially

with an increase in the number of compulsory trades. The OSTA submits the process must not only be objective, but be *seen to be* objective as well. This can only be achieved with an independent pre-assessment function.

c. Notice of Application

If it is determined a trade should be referred to a classification panel, the College should undertake a broad public consultation on the matter by issuing a public notice to all interested stakeholders. These stakeholders include but are not limited to: trade boards, divisional boards, tradespeople, employers (including employer associations), unions, training delivery agents, relevant government bodies and Ministries (OLRB, MAESD, *etc*.), and the general public. In regard to tradespersons, these must include both journeyperson and apprentice members of the trade, whether members of the College or not, as compulsory certification will result in an obligation to become a member of the College.

The notice should be posted on the College website and also *proactively distributed* to interested groups, similar to the manner in which the notice for the January 2017 Consultation was distributed. Any submissions provided by stakeholders should be considered in their entirety, and these groups should be given an opportunity for an oral consultation with the classification panel in order to build consensus and reduce the issues in dispute during the review, where possible.

d. Consideration of the New Process and Stakeholder Resources

Lastly, the OSTA wishes to highlight that when the process for referral and classification is finalized, there will likely be an influx of applications for trades seeking compulsory certification, or compulsory designation of certain tasks within the trade's SoP. These circumstances will involve a newly appointed Classification Roster, and a large number of interested stakeholders – both with limited time and resources. Further, there will be a number of stakeholders which may have interest in several trade classifications. In order to give the Pre-Screening function and Classification Roster time to adjust to the new process, and provide stakeholders with adequate time to respond, the OSTA submits the first trade classification reviews should occur one at a time, or at no greater pace than one review initiating every 120 days.

2. Journeyperson to Apprentice Ratios

The College is responsible for establishing the process and criteria for determining the appropriate journeyperson to apprentice ratio for a trade. In this regard, the OSTA notes its wholesale approval of the recommendations of the Dean Report. A number of the criteria recommended in the Dean Report are discussed briefly below. The OSTA also highlights a particular recommendation of the Dean Report - that the College collect and monitor research about ratios and make this information available to the public, as a show of transparency and accountability. The analysis should be statistical, not subjective. For instance, this could include occupational health and safety information, apprenticeship completion rates, geographical differences and regional disparities.

As noted in the consultation paper on this topic, the College has identified four public interest objectives of ratios (quality of training, health and safety, sustainability of skilled labour, and economic impact). In our submission, to try to prioritize these is to miss the point – each of these factors are of *primary* importance. Failure to focus on one will adversely impact the others. For instance, if priority is placed on economic impact, this could negatively impact quality of training. Similarly, if the focus is solely on quality of training, this could negatively impact the sustainability of skilled labour.

While it is apparent that each of these public interest objectives serves a different purpose, the OSTA submits that each of these public interest objectives is *equally* important to the safe and efficient functioning of the Ontario skilled trades system, and must be considered with *equal* weight. Each of these factors is of great importance to the public interest.

a. Barriers to Entry

The College must be aware of the impact its policies can have on access to a trade for individuals who seek to enter it – there can be no doubt that our province is experiencing a skills shortage while many sit on the sidelines seeking to enter the trades.[1] With the current skills shortage, there needs to be focus on providing opportunities to the next generation of skilled trades workers who want to enter the trades, and the employers who seek to train and educate them. The College should focus on granting access and creating opportunities to enter the trades, not erecting barriers.

b. Regional Differences

It is also clear the current process for ratio reviews is not taking into consideration (in a meaningful way) geographical differences present in rural, northern and aboriginal communities. The College must ensure that regulation does not limit economic opportunities in these communities. Ratio reviews occurring in Toronto do not adequately consider on-the-ground realities of contractors in Sudbury, Thunder Bay and elsewhere in the province. This has resulted in great difficulty for contractors in these regions. Geographical differences need to be considered and accommodated. The one-size-fits-all approach does not work in a province as large and diverse as Ontario.

c. Practice in Other Jurisdictions

Further, Ontario has some of the highest ratios in the country. At present, it seems the ratios in Ontario impact small contractors the most as they create barriers to entry for tradespeople seeking to enter the trades, and reduces the ability of employers to hire them as apprentices. The College must be sure to examine and learn from other jurisdictions that have managed to perform work safely, while at the same time not imposing undue barriers to entry.

[1] The Toronto Board of Trade and BuildForce Canada have each published independent reports highlighting skills shortages with a focus on construction.

d. Process and Timeline

Important procedural concerns include the fact that the College must not only be concerned with *how* ratios are set, but also by *whom*. The OSTA submits each panel conducting a ratio review contain an equal balance of employer and employee interests, and union (both traditional and progressive) and non-union interests.

In closing this section, the OSTA notes the concerns of a number of its member organizations that the time has come for another round of ratio reviews. In this regard, the OSTA urges the College to fulfill its duty to establish the process and criteria for these reviews so the process can begin as soon as possible.

3. Compliance and Enforcement Policy

a. Risk of Harm

Risk of harm is not new to Ontario regulators. The Technical Standards and Safety Authority ("TSSA"), Electrical Safety Authority ("ESA"), and Ontario Motor Vehicle Industry Council ("OMVIC") all follow a risk-based approach to compliance and enforcement (discussed below). The OSTA encourages the College to consult with these regulatory authorities in accordance with its new obligation do so under section 11.1(1)(c) of the *Ontario College of Trades and Apprenticeship Act* ("OCTAA").

In accordance with section 11.1(1)(a) of OCTAA, the compliance and enforcement policy must include a description of risk of harm and *how such risk will be accounted for in the enforcement of sections 2 and 4 of OCTAA*. This is a clear indication in the legislation that the definition of risk of harm must be tied to the enforcement function of the College.

The OSTA submits the definition of risk of harm in the compliance and enforcement policy *cannot be separated* from the statutory authority of the officers in the compliance and enforcement branch. The College has the authority to confirm that individuals practicing compulsory trades are licensed and members in good standing, and trades with ratios are in compliance. Attempts at enforcement for matters outside this scope exceeds the statutory authority of enforcement officers.

Simply put, in accordance with the Bill 70 amendments, the compliance and enforcement policy is to *define risk of harm as it relates to the College's statutory authority to enforce OCTAA*. For this reason, the risk of harm as it relates to the individual performing the work, others on the site, and the public, needs to be tied to the *performance of a compulsory trade and members of the public who come into contact with the work of a compulsory trade* – as this is the jurisdiction of the College.

How risk of harm is defined will have important implications on the skilled trade system in Ontario. The reason for this is that the definition of risk of harm contained in enforcement policy will be a key consideration in trade classification reviews, ratio reviews, enforcement visits and

reviews of administrative penalties by the Ontario Labour Relations Board. Further, the definition of risk of harm it will undoubtedly impact other important matters such as access to a trade for tradespeople who seek to enter it.

If the definition captures too many hypothetical risks, the ability to perform work effectively and efficiently will be negatively impacted. A definition of risk of harm that is too broad or considers factors too extraneous to the work in question will only serve as an impediment, with minimal, if any, increases in worker and public safety.

Once again, the HPRAC model provides useful guidance in how to define risk of harm. It considers risk of harm to health and safety of the public and *defines* risk of harm as: actions where a *substantial* or *significant* risk of physical or mental harm may result *from the practice of the profession*.

Under HPRAC, as a threshold criteria, it is the Applicant that must demonstrate risk of harm with *relevant and verifiable evidence*. The OSTA submits this evidence-based approach should be employed by the enforcement committee in determining what constitutes a risk of harm in the enforcement policy. This should include health and safety information and other relevant, raw data, not speculation.

In the HPRAC model, it is only once this threshold risk of harm is established with relevant and verifiable evidence that **secondary criteria** are considered. These secondary criteria include whether regulation is, in fact, the most appropriate and effective means in order to protect the public.

The OSTA submits that a corresponding approach should be taken by the compliance and enforcement committee and should include:

1. whether there is a significant risk of harm *within the jurisdiction* of the College; and
2. whether that risk of harm is *already accounted for* by another regulatory regime (such as the Ministry of Labour)

For instance, the TSSA employs a Risk Informed Decision Making (RIDM) process, whereby "risk" is defined as the *probability* or *frequency* that a regulated technology, product, device or infrastructure could lead to harm of the public and combines this with the severity of that harm. Again, we see analysis of risk focused on data. In carrying out the RIDM process the TSSA gathers data related to incidents and non-compliance, examines trends or patterns, then makes risk-informed decisions to manage future public safety matters. In such a quantifiable way, TSSA seeks to prevent incidents through an understanding of how they occur, how serious they are, and how risk can be controlled.

OMVIC also maintains an inspection program that employs risk-management principles to target problem areas, review consumer and dealer complaints and anticipate trends that pose a risk. For example, high-risk registrants (dealers having had a new-dealer inspection only, being the subject of serious or numerous complaints, having their last inspection result in a referral to senior management or having a formal Discipline history) are visited more frequently than the general dealer population.

The key to the success of these programs is reliance on objective and verifiable data. Focus must be placed on areas that actually need it, not areas that *could possibly* need it. As defined in OCTAA, the focus of risk of harm will be on individuals performing the work, other workers on site, and the public. These groups must be broken down and the relevant risks of harm defined for each. Similar to the HPRAC and TSSA approach, in order for a risk of harm to be the subject of enforcement, it must be demonstrated with relevant and verifiable evidence that a substantial risk exists. Once certain risks of harm within the jurisdiction of the College are established in this manner, the enforcement policy, as part of its annual identification of risks, should prioritize the risks from highest to lowest, and address the risks in that order.

a. Employer Issues on the Ground

The OSTA also wishes to raise specific concerns of companies that are members of our individual associations. In particular, these member companies have been left with the impression, based on College enforcement activity, that non-union companies and progressively-bound companies are being targeted for enforcement.

Some of our member companies have expressed the belief the complaint process is being exploited by union representatives who file repeated complaints against certain contractors in order to inundate them with site visits and inspections, and wage jurisdictional battles in the College forum. In the result, these complaints do not have merit, yet still result in repeated visits from College enforcement. The decision to conduct inspection and enforcement activities cannot be related to the presence (or absence), of a particular union's bargaining rights. The compliance and enforcement policy must ensure that these practices do not occur and that enforcement is conducted without regard to factors which are outside the scope of OCTAA.

b. Labour Relations Considerations

The enforcement policy should address and take into account: (1) collective agreements, (2) trade agreements and (3) decisions of the OLRB ("Labour Relations Considerations") on the *front end* of the enforcement function. While section 11.1(1) of OCTAA defines what must be in the enforcement policy, it does not tell the Committee what cannot be in the policy. As noted in the consultation paper, these are only the minimum mandatory requirements.

Taking these factors into account upfront means enforcement officers should be able to consider them *when conducting a field inspection* or at the very least, when processing a field inspection report after the visit has occurred. Consideration of these factors should also be addressed in policy directives to the enforcement branch.

The College is operating in a vibrant labour relations arena. Pillars of this arena include relevant agreements and over 50 years of jurisprudence from the OLRB. The compliance and enforcement policy should mandate consideration of these factors so it can be compatible with the existing labour relations environment.

There is also an important public policy consideration that supports this front-end consideration of these factors. This is due to the fact that when the appeals process moves from the provincial courts to the OLRB, the OLRB will be considering: (1) relevant SoPs, (2) the compliance and

enforcement policy, (3) risk of harm, and (4) *any other factor the OLRB considers relevant.* It is under this fourth factor that there is every expectation the OLRB will consider collective and trade agreements as well as its past decisions.

Labour relations considerations must be taken into account *before* a matter gets to the OLRB to avoid a potential *reverberation effect.* That being, College officers not taking these relevant considerations into account, only to have the OLRB overturn the finding when considering these factors. These findings will then have to work their way back to the enforcement branch. Failure to consider all relevant considerations up front, will result in costly and time consuming back and forth, all at the expense of College stakeholders.

c. Reporting and Accountability

While the College has released limited information on what to expect procedurally, there is little or no public information available on what is guiding the decision making of enforcement officers on the ground. For instance, while the Dean Report references the College's Legal Interpretation Principles on Overlapping SoPs, the SoP Matrix, Overlapping Action Matrices and the General Overlap Catalogue, little (or any) of this has been communicated to stakeholders in any meaningful manner.

Nevertheless, at present, it appears the College continues its "to-the-letter" enforcement of compulsory SoPs outlined in OCTAA regulations, in the absence of considering other factors. Given the fact many compulsory SoPs were drafted in the 1960s and have not been meaningfully updated, and many SoPs conflict with OLRB decisions, there needs to be more information about how these outdated SoPs and conflicts with relevant jurisprudence are addressed in the field.

For instance, on the ground, how are enforcement officers determining whether an individual is "engaging in the practice" of a compulsory trade? Are officers making personal judgments on outdated SoPs, or is other information being considered? Stakeholders need to be aware of all considerations made by enforcement officers.

Further, more information needs to be made available on enforcement statistics. The College releases monthly stats on the number of provincial offences notices issued, complaint calls received, and inspections completed, but greater information should be released on how enforcement practices are carried out, including:

a) The number of enforcement visits conducted by sector, and preferably by trade, in a given month.
b) The number of offence notices issued by sector, and preferably by trade, in a given month, with specific information detailing what practice resulted in the offence notice.
c) The number of enforcement visits and offence notices issued in a given month by region.
d) The number of proactive inspections carried out as opposed to how many are conducted in response to complaints.
e) How many complaint calls were received by third-party organizations or individuals, as opposed to consumers.
f) How many complaint calls were actively followed-up on.

g) How many complaint calls that were investigated actually resulted in offence notices.

Employers need more information on how enforcement activities are carried out by the College. In this regard, the College should consult directly with the Ministry of Labour in relation to its enforcement of the *Occupational Health and Safety Act*, which has a greatly evolved practice and standard for communication and encouraging compliance.

d. Privacy Concerns

The College's privacy policy is focused on *members* and information provided by *members*. For example, the definition of "confidential information" in the policy covers "any confidential or proprietary information or trade secrets…provided to [the College] by any *member* organization…" The fact remains that many employers are not members of the College. Does this policy cover a non-member employer's confidential information that has been provided at the request of an enforcement officer?

In addition, there seems to be confusion in the field at present regarding what type of information an enforcement officer is entitled to request and collect. It is essential that the compliance and enforcement policy clearly define the scope of an enforcement officer's authority in this regard. This authority relates to enforcement of Part II of OCTAA – practice of *compulsory* trades, *members* of the College and compliance with ratios. This authority does not extend to requests for full lists of ongoing jobsites and full employee lists, whether members of the College or not. Although many employers are willing to cooperate, the authority to request information must be made clear in the compliance and enforcement policy, so that members of the public understand their obligations in relation to demands of a government agency.

Lastly on this point, because of ongoing collection of information by enforcement officers, the OSTA submits that the procedure and process for the protection of this information, including to whom and how it may be distributed, should form part of the compliance and enforcement policy given the direct tie between enforcement activities and the privacy concerns of the public.

e. Duplication of Government Services

At the outset, it is important to note that protecting the public interest also involves avoiding the duplication of government services. The OSTA submits the public interest is not served by duplicating regulatory regimes or enforcement mechanisms that are already in existence for the express purpose of protecting the public interest[2]. The Compliance and Enforcement Committee should consider the role of agencies such as this, and how to avoid overlap, in defining risk of harm and conducting enforcement based on that risk.

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[2] These governmental bodies include, but are not limited to: the Ministry of Labour (enforces the *Occupational Health and Safety Act*), the Ministry of Municipal Affairs and Housing (administers the *Building Code*), Ministry of Consumer Services (enforces the *Consumer Protection Act*), ESA (responsible for the *Ontario Electrical Safety Code*; licensing of Electrical Contractors and Master Electricians, electricity distribution system safety; and electrical product safety.), OMVIC (enforces the *Motor Vehicle Dealers Act)*, and the TSSA (enforces *Technical Standards and Safety Act*; delivers public safety services on behalf of the Government of Ontario in four key sectors: boilers and pressure vessels; elevating devices; fuels; and upholstered and stuffed articles).

Again, the OSTA submits that a threshold question to whether there is a risk of harm that should be addressed by the College, must be whether that risk is ameliorated by another regulatory regime.

Duplication results in conflict between the various processes and decisions, and wasted public resources (such as the courts) to resolve these conflicts. Duplication and inconsistency also erode the credibility of the process generally (in the eyes of consumers, employers and tradespeople), by undercutting predictability and certainty in the regulation of trades.

Conclusion

Thank you for the opportunity to provide submissions on the implementation of the Bill 70 amendments. The OSTA welcomes further opportunity to meet with the College to advance this important work.

Yours very truly,

Patrick Ganley, Sherrard Kuzz LLP, Employment and Labour Lawyers

On behalf of:

THE ONTARIO SKILLED TRADES ALLIANCE

cc: The Honourable Kevin Flynn, Minister of Labour
Mr. David Tsubouchi, Registrar / CEO
Mr. Bruce Matthews, Deputy Registrar