



Ministry of Labour
400 University Avenue, 12th Floor
Toronto, Ontario
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May 12, 2017

Delivered via E-mail

Re: Proposed Regulations to specify Administrative Penalties amounts under the *Ontario College of Trades and Apprenticeship Act, 2009*

On behalf of the Ontario Skilled Trades Alliance (OSTA) we are pleased to provide the following written submission on the Proposed Regulations to specify Administrative Penalties (APs) amounts under the *Ontario College of Trades and Apprenticeship Act (OCTAA)*.

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 Ontario College of Trades (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. The OSTA also took the opportunity to make oral submissions to the Compliance and Enforcement Committee and deliver written submissions to the Bill 70 Legislative Amendments Consultation conducted by the College.

The Call for Submissions on Administrative Penalties is Untimely

At the outset, the OSTA wishes to state its view that the call for submissions on the amount of APs is untimely, as stakeholders have not yet had a chance to review and consider the Compliance and Enforcement Policy (Enforcement Policy) mandated in section 11.1(1) of *OCTAA*. Under Part VIII.1 of *OCTAA*, an enforcement officer is obliged to consider the Enforcement Policy, prior to issuing a notice of contravention which will result in an AP.

There can be no doubt the Enforcement Policy is intended to directly affect the manner in which enforcement is carried out, and the frequency with which APs will be levied. The present submission is required by May 13, 2017, yet the Enforcement Policy is not expected to be made public until June 6, 2017. On this basis, the OSTA requests a further opportunity to provide you with its views about the amount of APs once the Enforcement Policy is available to us for consideration.

The Proposed Amounts of APs are Excessive in Light of their Stated Purpose

The Bill 70 amendments to *OCTAA* introduced APs to the College Enforcement function, and set out the purpose of those penalties. Section 59.1(2) of *OCTAA* (not yet in force) provides that the purposes for which a person may be required to pay an AP are: (1) to encourage compliance with section 2 or 4 of *OCTAA*; and (2) to prevent a person from deriving directly or indirectly, any economic benefit as a result of a contravention of section 2 or 4.

In our submission, the proposed amounts for APs go far beyond achieving these objectives and can be reasonably construed as imposing extraordinary penalties for what may in some circumstances be an unintentional technical violation of section 2 or 4. The proposal seeks to replace the current amounts of \$195 for an individual and \$295 for an employer (on a ticket for a first offence) with a maximum amount of \$2500 for an individual and up to \$100,000 for an employer (on a first offence). These astronomical increases are largely due to the introduction of the concept of imposing a continuing daily penalty for each day a contravention continues. These proposed amounts go far beyond encouraging compliance and preventing a person from deriving an economic benefit from a contravention. Further, the proposed amounts are not accompanied by any evidence to suggest they will actually achieve their stated purpose. While Part VIII.1 of *OCTAA* provides factors for Enforcement Officers to consider prior to issuing a fine, the amounts in the AP proposal are fixed. Thus, it appears the discretion of the Enforcement Officer to determine the amount appropriate to achieve the objectives in section 59.1(2) when issuing a Notice of Contravention is removed. In this regard, not only are the amounts of proposed APs far too high given their stated purpose, the only manner in which the context of an offence can be assessed when determining what amount is appropriate may be through the proposed appeal process to the Ontario Labour Relations Board.

The Proposed Amounts of APs are Excessive when Compared to other Provincial Regulatory Regimes

The proposed amounts of APs are also excessive when compared to other regulatory regimes. For example, under the *Highway Traffic Act*, the penalty for driving a motor vehicle with no license is \$260. When comparing this to the amounts proposed for APs under *OCTAA*, the absurdity of the proposed figures becomes clear.

An individual who drives a motor vehicle without a licence for 10 days, putting thousands of Ontarians at risk in the process, is subject to a \$260 fine. On the other hand, under the current proposal for APs, an individual who has been practicing a compulsory trade for years, but whose Certificate of Qualification has been suspended due to non-payment of fees, is subject to a \$2500 AP if the Enforcement Officer determines that individual had been performing the trade for 10 or more days and it was a first offence.

Perhaps the best regulatory comparator is employment and labour legislation since such legislation is tied directly to the performance of work and the safety of those involved in that work. To be clear, the objects of the College in section 11 of *OCTAA* do not include governance of worker health and safety. However, the proposed amounts for APs go beyond current fines established by the *Employment Standards Act (ESA)* and *Occupational Health and Safety Act (OHSA)*, the legislation that does address that important purpose.

Prosecution under the *ESA* is initiated through the *Provincial Offences Act (POA)*. Where an employer or individual is found to have committed an offence dealt with under Part I of the *POA*, this is generally addressed through the use of tickets and fines. An employment standards officer has the authority to issue a ticket to an employer who fails to comply with specific provisions of the *ESA*. A ticket carries a set fine of \$295, plus applicable costs and victim fine surcharges. Misconduct that carries a \$295 dollar fine includes: improperly withholding wages, failing to pay overtime, failing to give an employee the appropriate amount of time off in a day or between shifts, failing to provide an employee time to eat, failing to pay minimum wage and failing to provide notice of termination or pay in *lieu* of notice. All of these are serious and fundamental violations of the *ESA*, yet the penalty amount does not come near the proposed AP amounts for a violation of *OCTAA*. Further, the penalties under *ESA*, unlike the proposed APs, do not accumulate daily.

Under the *ESA*, an individual or corporation can be convicted of an offence dealt with under Part III of the *POA*, which results in more significant liability. However, penalties under Part III are generally imposed where an employer has failed to comply with an earlier compliance order issued by an employment standards officer. Under the AP proposal, there is no method by which an employer is first warned with a reasonable fine and given an opportunity to correct the infraction. The proposal provides only a \$100,000 maximum for an employer that can be reached with a single contravention on the basis of an accrual of daily penalty amounts. Further, unlike the AP proposal for individuals, there is currently no set maximum number of days when penalizing an employer under section 4 of *OCTAA*. In our submission, there must be some form of temporal restriction or limitation period on an AP issued against an employer other than a staggering \$100,000 maximum.

The *OHSA* includes a similar enforcement mechanism whereby many violations are addressed with a ticket, followed by a charge if the employer fails to comply with an order to correct. For instance, the following violations involve direct jeopardy to the health and safety of a worker and carry the following monetary penalties:

- Failing to ensure a worker uses a machine with adequate guarding - \$300
- Failing to provide a safe chain saw - \$300
- Failing to ensure no work is done on or near live exposed parts of electrical installations, equipment or conductors without the power being disconnected - \$300
- Failing to provide appropriate head or eye protection - \$300

Similar to the *ESA*, a charge or conviction related to the offences listed above will involve more significant penalties where the employer has failed to comply with an order. These penalties do not accrue for every day the offence continues and commonly provide the employer an opportunity to comply.

Inherent Conflict of Interest and the Public Trust

Ministry of Labour (MOL) Officers who enforce the *ESA* and *OHSA* have been an integral part of the labour and employment landscape for decades. Accordingly, those Officers, and the penalties they can impose, are well known to employers, workers and the public. MOL Officers have established credibility in enforcing their respective legislation. The same cannot be said for the Enforcement Officers of the College. In the wake of the Bill 70 amendments the process and procedures that will be used by the College Enforcement Officers remain undetermined since the Enforcement Policy under which they will operate has not yet been released.

On this basis, the OSTA submits that time must be provided for the College enforcement function to gain the trust of the public and stakeholders in the skilled trades. Giving these officers the authority to impose significant penalties that match or exceed established and essential regulatory regimes found in the *ESA* and *OHS* does not further this objective.

The need to reconsider and significantly reduce the amounts of APs currently proposed is also supported by the inherent conflict of interest they present. The College is responsible for setting the policy that will guide enforcement activity, and our understanding is it is also the entity that receives the revenue generated by APs. *OCTAA* provides the College with a legislatively established enforcement function, and the current AP proposal authorizes College Enforcement Officers to impose substantial monetary penalties that will benefit the College. This presents a number of concerns, not the least of which is a relatively new regulatory body that is the direct beneficiary of its own enforcement activity. Setting the amount of APs should be approached with caution given the College has not yet gained the public trust.

The Proposed Amounts of APs act as a Disincentive to Enter the Skilled Trades

The stated purposes of APs listed above are valid objectives, but so too is an objective of the College listed in section 11 of *OCTAA*: to promote the practice of trades. Our province is currently experiencing a skills gap in the skilled trades that is only predicted to widen. In our submission, the significant APs currently proposed will not assist in encouraging individuals to enter, and stay, in the skilled trades system. These important objectives must be considered in setting the amounts of APs. The proposed AP amounts and process will only serve as a disincentive for individuals who might otherwise seek to enter the skilled trades system.

A Revised AP Proposal

In our view, for the reasons listed above, the proposed AP amounts are simply too high and too onerous when compared to the stated objective of APs, similar regulatory regimes, and the potential impact the proposals will have on the public trust and those who wish to enter the trades.

In our submission, the penalty for a first offence should stay at \$195 for an individual and \$295 for an employer. When this notice of contravention is issued, it should be issued with an order to comply. Similar to other regulatory regimes, only if an individual or employer fails to comply with such an order should more significant penalties and/or daily penalty amounts be imposed. In this way, the objectives of APs will be met and many of the issues noted above adequately addressed.

Thank you for the opportunity to provide this submission on the Proposed Regulations to specify Administrative Penalties amounts under *OCTAA*. The OSTA welcomes the opportunity to discuss this with the MOL and the College further once the Enforcement Policy has been made public.

Yours very truly,

THE ONTARIO SKILLED TRADES ALLIANCE

cc: Mr. David Tsubouchi, Registrar / CEO
Mr. Bruce Matthews, Deputy Registrar