



ONTARIO SKILLED TRADES ALLIANCE

December 13, 2013

Trade Classification Reviews
Ontario College of Trades
655 Bay Street, Suite 600
Toronto, ON M5G 2K4

As the Chair of the Ontario Skilled Trades Alliance (OSTA) – representing 32 trade associations, including 8,000 companies who employ in excess of 130,000 workers across the province – I am writing to submit our formal objection to Mr. Bernard Fishbein acting as Chair of the Review Panel for the compulsory certification review of the Sprinkler and Fire Protection Installer Trade under the provisions of the *Ontario College of Trades and Apprenticeship Act, 2009*, SO 2009, c22 (the “Act”).

At the outset of the Sprinkler and Fire Protection Installer Trade compulsory certification review on November 28, Mr. Fishbein provided information that suggested he may have a potential conflict of interest in serving as Chair of this Review Panel. As a result of this disclosure, the review process was adjourned to allow involved stakeholders the opportunity to consider their course of action. After much discussion amongst our group, we have chosen to make a formal objection, as it is our contention that Mr. Fishbein should recuse himself from this panel on the basis of a reasonable apprehension of bias.

The test for identifying a reasonable apprehension of bias has been confirmed by the Supreme Court of Canada (see for example, *R. v. S. (R.D.)* 1997 CanLII 324 (SCC), (1997), 151 D.L.R. (4th) 193 (SCC) at para. 31):

[T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

In the Interim Decision of the Review Panel dated December 2, 2013, Mr. Fishbein sets out certain details of the potential conflict of interest which were also referred to during the oral hearing held on November 28, 2013. It is our position that Mr. Fishbein’s prior professional association with Local 853 constitutes a very real and significant potential for bias.

Notwithstanding his prior professional associations and activities, we believe that a more important issue relates to how Mr. Fishbein has been or could be influenced under the review panel process set out under the Act. It is our position that this process does not allow Mr. Fishbein the tools to insulate himself from bias. There is no procedural process in place under the Act and as a review panel of first instance there is no historical jurisprudence or precedent on which Mr. Fishbein can rely in order base his decisions. As a result, the review panel process does not allow for him to be insulated from bias, **unlike** the more rigid process and precedential context under which he normally functions at the OLRB.

Furthermore, Mr. Fishbein is the Chair of the OLRB, the body which will make any subsequent jurisdictional decisions which arise out of the determination of this Review Panel. This fact further raises questions regarding the likelihood of a reasonable apprehension of bias. Given the distinct possibility that Mr. Fishbein will be involved in substantive decisions regarding the jurisdiction of members of the Sprinkler and Fire Protection Installer Trade going forward, he should not be placed in a position to make a binding determination for this Review Panel.

In a previous decision of a similarly constituted review panel for the purposes of a ratio review for the Residential (Low Rise) Sheet Metal Installer; Sheet Metal Worker Trade, dated March 11, 2013, Vice-Chair Mckee found no reasonable apprehension of bias in regards to a member of that review panel. We have attached a copy of that decision to this submission. In that proceeding, counsel for the Ontario Sheet Metal and Roofers Conference argued that a member of the review panel should recuse himself due to his professional activities which conflicted, in their opinion, with his role on the review panel. After rejecting a preliminary request for the production of certain documents, Mr. Mckee went on to reject the merits of the request, noting at paragraph 20:

A ratio review panel has no role in supervising or directing the activity of the College or the Appointments Council. We are an ad hoc panel drawn from the roster of adjudicators for a specific purpose. Once we have come to a decision as to what the ratio ought to be, we have no other function

These findings are distinguishable from the present Review Panel as Mr. Fishbein *will* have an ongoing role with the jurisdiction of the Sprinkler Fitter's trade. Furthermore, the member in question in that objection was not the Chair of the review panel, as Mr. Fishbein is for the present Review Panel.

Finally, we must object now, at this point, because our understanding is that there is no forum for an appeal of a review panel's classification of trades decision. While the Interim Decision notes that a previous ratio review panel decision of Mr. Fishbein may be the subject of a judicial review, it is not clear where the authority for such a review would be found. In fact, section 21(3) of the Act specifically states that "A decision of a review panel is final and not subject to appeal, and a decision of a review panel shall not be altered or set aside in an application for judicial review or in any other proceeding."

We believe that this instance of bias of a review panel Chair (particularly for the *first* compulsory certification review to proceed under the Act) is indicative of serious problems with the vetting process (or lack thereof) that the College has in place for the appointment and composition of members of review panels. The onus is on the College to ensure that they have the processes in place to protect both their stakeholders and the review panel members from any questions of bias. It is our opinion that these

processes do not exist. The fact that the information regarding a possible apprehension of bias was withheld from the stakeholders involved in this process until the day that the hearing was set to occur speaks to the larger problems of openness and transparency. These are issues that need to be addressed.

Moreover, there is no formal process laid out in the Act or College By-Laws for objections to a review panel process. As no formal process has been identified, it is our understanding that this process should be simplistic in approach and does not require the involvement of legal counsel (as per the intention of the College to be governed by the trades themselves). It is our understanding that this process is completely separate and dissimilar from the Ontario Labour Relations Board objections process, where a much different and more complex approach is in place which is supported by labour law and legal precedent. In this instance, because there is no precedent to rely on or formalized process in place to address such matters, we have chosen to respond on an informal basis, consistent with the College's mandate.

We trust these submissions will be of assistance to the Review Panel in making a determination that a reasonable apprehension of bias exists in the appointment of Mr. Fishbein as Chair. As a result of this determination, we would request that Mr. Fishbein recuse himself from this Review Panel, and steps be taken by the College to ensure that the appointment of a Chair for this Review Panel, as well as all future review panels, be done in a manner which ensures that no issues of bias arise. This is essential to ensure the open and transparent fulfillment of the duties of the College, as mandated by the Act and its governing By-Laws.

Sincerely,

A handwritten signature in black ink, appearing to read 'K Renkema', with a stylized flourish at the end.

Karen Renkema
Chair
Ontario Skilled Trades Alliance

encl: Ratio Review RR16-2012