Court File No.: **34948**

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

MOUNTED POLICE ASSOCIATION OF ONTARIO/ ASSOCIATION DE LA POLICE MONTÉE DE L'ONTARIO AND B.C. MOUNTED POLICE PROFESSIONAL ASSOCIATION ON TEIR OWN BEHALF AND ON BEHALF OF ALL MEMBERS AND EMPLOYEES OF THE ROYAL CANADIAN MOUNTED POLICE

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(Applicants in the Ontario Court of Appeal)

\- and -

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent in the Ontario Court of Appeal)

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INDEX

OVERVIEW **1**

PART I – FACTS **2**

PART II – QUESTIONS IN ISSUE **2**

PART III – ARGUMENT **3**

Good faith, not the *Wagner Act*, is the touchstone of the s. 2(d) right **4**

The *Wagner Act* has machinery to regulate and protect good faith **6**

The *Wagner Act* is not the constitutional standard **7**

Wagner Act regulation of independence is just one means of assuring good faith **8**

Constitutional flexibility is the preferable approach **12**

PART IV – COSTS **20**

PART V – RELIEF REQUESTED **20**

PART VI – TABLE OF AUTHORITIES **21**

PART VII - LEGISLATION AT ISSUE **24**

OVERVIEW

1. The Appellant associations seek to have this Court constitutionalize their preferred model of collective bargaining. The Appellants' core error lies in defining "collective bargaining" as including only *Wagner Act*-style labour relations. Yet, for sound reasons, this Court has consistently held that the *Charter* does not protect the right to any particular system of labour relations, such as the *Wagner Act* model.

2. The federal government has established a system of labour relations for the RCMP – the Staff Relations Representative program (SRR) – which ensures that employee representations will be presented to the employer in good faith by the employees in association and that the representations will be considered in good faith by the employer. This respects the right to a process of collective bargaining as recognized by this Court in *Health Services* and *Fraser*.

3. Ontario submits that this appeal can be fully resolved by assessing the issues through the lens of good faith. This Court has established that section 2(d)'s protection of a derivative right to a process of collective bargaining requires employers to *consider the representations of employees in association in good faith*. In *Health Services* and *Fraser* this duty on the employer was understood to be a corollary to the employees' right to collective bargaining. Equally important, however, is the *good faith required of the association* representing the employees. A right to a process of collective bargaining is meaningless unless the association representing the employees is obliged to conduct itself in good faith. The association must conduct itself in good faith both (a) *vis-à-vis* the workers it is purporting to represent, and (b) *vis-à-vis* the employer to whom it is making representations on their behalf.

4. In the present case, Ontario submits that on the facts as found below, that the SRR is required to, and does, conduct itself in good faith with respect to both the employees it is representing and the employer to whom it is making representations; and the employer, in turn, considers the SRR's representations in good faith. This is sufficient to satisfy the requirements of the constitutional right to a process of collective bargaining.

5. It is, therefore, neither necessary nor helpful to engage in an analysis of the extent to which the SRR program departs from the *Wagner Act* labour relations model with respect to the characteristics of certified bargaining agents, the process of certification, and the rights and obligations of bargaining agents and employers that arise prior to and then after certification. These are features of a peculiar labour relations regime which, although constitutionally sufficient to satisfy s. 2(d), are not constitutionally necessary.

PART I – FACTS

6. Ontario intervenes pursuant to the Notice of Constitutional Questions and accepts the facts as summarized at paragraphs 6-17 of Canada's factum.

PART II – QUESTIONS IN ISSUE

7. Ontario's position on the four Constitutional Questions is as follows:

   a. **Question 1:** Does s. 96 of the Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, infringe s. 2(d) of the *Canadian Charter of Rights and Freedoms*? **Ontario's Position**: No, it does not infringe s. 2(d).

   b. **Question 2:** If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of

the *Canadian Charter of Rights and Freedoms*? **Ontario's Position**: It is not necessary to answer this Question.

c. **Question 3:** Does paragraph (d) of the definition of "employee" at s. 2(1)(d) of the Public Service Labour Relations Act, S.C. 2003, c. 22, infringe s. 2(d) of the *Canadian Charter of Rights and Freedoms*? **Ontario's Position**: No, it does not infringe s. 2(d).

d. **Question 4:** If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*? **Ontario's Position**: It is not necessary to answer this Question.

PART III – ARGUMENT

8. Having recognized a derivative right to a process of collective bargaining under s. 2(d) of the *Charter* in *Health Services* and *Fraser*, this Court is now called upon to define the contours of that right with respect to a legislatively mandated system of employee representation for members of the RCMP that departs from the oppositional system of labour-management relations found in the *Wagner Act*. The substance of the Appellants' argument is that the *Wagner Act* approach is constitutionally mandated in this case. Under this argument, the SRR does not meet the requirements of s. 2(d) as it lacks distinctive features of the *Wagner Act* model.

9. This argument is unsupportable in principle, in the jurisprudence, in domestic and international experience, and for sound reasons of labour and constitutional policy.

Good faith, not the *Wagner Act*, is the touchstone of the s. 2(d) right

10. Ontario submits that what the s. 2(d) protection of a procedural right to collective bargaining requires is an opportunity for employees in association to make representations to their employer in good faith, and to have the employer consider those representations in good faith. For the right to be meaningful, both employee association and employer must conduct themselves in good faith.

11. This Court has already established the right of employees to have their employer consider their association's representations in good faith. This flows from the fact that a process of collective bargaining implies a relationship of multiple parties (two at least), engaged with each other in a relationship of some mutuality, "in the pursuit of a common goal of peaceful and productive accommodation".

> *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 40, per McLachlin CJC and Lebel J [*Fraser*].
>
> *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 90, per McLachlin CJC and Lebel J.

12. For the process to work at all, however – and for the protected right of the employees to have meaning – it is not merely the employer which must be obliged to act in good faith. The association itself must be bound – explicitly or impliedly – to a duty of good faith. The protected right under s. 2(d) is that of *individual* employees to address workplace goals *in association* – through the power of group effort. If the association fails to act in good faith, either *vis-à-vis* the employees it purports to represent, or *vis-à-vis* the employer to whom it is making representations, the right of the employees to have their workplace goals addressed through the *Charter*-protected process is defeated.

13. Where, for example, an association works contrary to the interests and goals of the employees it purports to represent (as in the case of the notorious "company unions" of the early 20th Century), the employees' right to a process of collective bargaining is effectively meaningless. Similarly, where an association, in bad faith, prefers the interests of one class of its members at the expense of another class, while purporting to represent the best interests of the whole, the procedural right of the latter class to representation by the association is defeated.

14. The good faith required of the association has another dimension. The employees' right to have the representations made by their association *considered* in good faith by the employer will be undermined if those representations are not *made in good faith to the employer*. This is because an employer (e.g. a government in the case of public sector workers) cannot be required by the procedural right to collective bargaining to consider in good faith a representation that has not been made to it in good faith. For example, a government employer may call its bargaining partner stakeholders to a consultation to address a pressing matter (e.g. fiscal challenges and rising labour costs) and the bargaining agents may decline to participate or participate by unreasonably delaying or "surface bargaining" with no genuine intention of addressing the issue. Then the government is in no position to consider the associations' representations in good faith; nor can it be expected to do so. While associations may be free to engage in such conduct[1] to achieve political ends, they may by such conduct disentitle their membership from being able to assert a breach of s. 2(d)'s procedural right to collective bargaining if the government then acts unilaterally. In such a situation the *employees'* right to have their representations on important workplace

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[1] Subject to the ordinary rules of the applicable labour statutes.

issues considered in good faith will defeated by virtue of their own association's lack of good faith in its interactions with the employer. The requirement of mutual good faith – on which the procedural s. 2(d) right is premised – will be missing:

> … the employees' right to collective bargaining … requires *both* employer *and employees* to meet and to bargain *in good faith*, *in the pursuit of a common goal of peaceful and productive accommodation.*
>
> *Health Services*, *supra* at para 90, per McLachlin CJC and Lebel J.

The *Wagner Act* has machinery to regulate and protect good faith

15. It is obvious that the *Wagner Act* model contains elements to address the issue of mutual good faith as between association, and employer and the model also seeks, through a detailed system of prohibitions and regulation, to ensure the good faith of associations *vis-à-vis* the employees they represent.

16. Section 17 of the Ontario *Labour Relations Act, 1995*, for example, creates a statutory duty to bargain in good faith on both employers and bargaining agents. This duty is enforced before the Ontario Labour Relations Board.

> *Labour Relations Act, 1995*, SO 1995 c 1, s 17.

17. Other parts of the *Labour Relations Act, 1995* contain exhaustive provisions governing bargaining agent independence from management, bargaining agent selection and certification as well as a duty of fair representation owed by the bargaining agent to the bargaining unit members. Such provisions all comport with the requirements of s. 2(d) and seek to foster and codify the essential good faith relationships between employers and associations on the one hand, and between associations and their members on the other. As an integral part of the *Wagner Act* model they may well be indispensable.

> *Labour Relations Act, 1995, supra,* ss 1, 7, 8, 8.1, 9, 10, and 74.

The *Wagner Act* is not the constitutional standard

18. This Court has repeatedly cautioned, however, that the *Wagner Act* model is not the only constitutionally acceptable approach to addressing these issues and providing a meaningful *Charter* right to a process of collective bargaining. This Court's jurisprudence, before, after and including *Health Services* has been very clear that there is no right to be included in a particular statutory collective bargaining regime. This Court has also consistently cautioned against prioritizing one model of labour relations over others.

> *Re: Public Service Employee Relations Act (Alberta Reference),* [1987] 1 SCR 313 at para 106, per Dickson CJC, dissenting.
>
> *Delisle v Canada (Deputy Attorney General),* [1999] 2 SCR 989 at para 33, per Bastarache J.
>
> *R v Advance Cutting & Coring Ltd,* 2001 SCC 70 at paras 157-158, per Lebel J.
>
> *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 36, per Bastarache J.
>
> *Health Services, supra* at para 91, per McLachlin CJC and Lebel J.
>
> *Plourde v Wal-Mart Canada Corp*., 2009 SCC 54 at para 55, per Binnie J.
>
> *Fraser, supra* at paras 45, 77, 106, per McLachlin CJC and Lebel J.

19. In *Health Services*, this Court articulated the *Charter* right to collective bargaining as a "limited right" which "does not cover all aspects of 'collective bargaining', as that term is understood in the statutory labour relations regimes that are in place across the country".

> *Health Services, supra* at paras 19, 91, per McLachlin CJC and Lebel J. See also para 89, per McLachlin CJC and Lebel J.

20. In *Fraser*, this Court reiterated that the "the core protection of s. 2(d) focusses on the right of individuals to act in association with others to pursue common objectives and goals". What is protected is a "meaningful" process, and in the labour relations context, this includes "good faith bargaining on important workplace issues … This is not limited to a mere right to make representations to one's employer, but requires the employer to engage

in a process of consideration and discussion to have them considered by the employer [citations omitted]".

Fraser, supra at paras 25, 40, per McLachlin CJC and Lebel J.

21. There is thus no constitutional right to a particular model of labour relations, or to a particular process or preferred method of collective bargaining. Further, neither *Health Services* nor *Fraser* support the proposition that s. 2(d) gives employees a constitutional right to the representation of their preferred bargaining agent. Different models of collective bargaining may have different methods for bargaining agent selection. Under the *Wagner Act* model the bargaining agent is typically determined by majority selection.

Health Services, supra at para 90, per McLachlin CJC and Lebel J.

Fraser, supra at paras 46-47, per McLachlin CJC and Lebel J.

Labour Relations Act, 1995, SO 1995 c 1, s 10.

***Wagner Act* regulation of independence is just one means of assuring good faith**

22. In the present appeal, the Appellants claim that *Wagner Act*-type guarantees of the strict independence of the employee association from management must be prescribed in legislation, and the SRR, they claim, fails this test.

23. In Ontario's submission, however, the question raised by the Appellants – that of the *Wagner Act*-style independence of the employee association and the related questions of majority support, exclusivity and certification procedures are subsumed in the question of good faith. The issue that matters is not whether the association through which the employees bring workplace concerns to the employer is strictly independent, as understood through the lens of the *Wagner Act* where management and workers are regulated as adversaries; rather, the issue is whether the employees are being represented in good faith by

the association which is responsible for bringing their concerns to management. The collective voice of the employees is realized and made meaningful through the process of *good faith* representation, regardless of the question of independence. The machinery in the *Wagner Act* model that seeks to guarantee independence is one but not the only means of realizing this goal. To focus on the independence of the association *for its own sake* is to turn s. 2(d) into a right enjoyed by associations themselves, as opposed to the right of individuals in association. *Fraser* has confirmed that the s. 2(d) collective bargaining right is an individual right.

> *Fraser*, *supra* at para 25, per McLachlin CJC and Lebel J.

24. In the present case, as found by the Application Judge and the Court of Appeal, the SSR program, embodied in regulation SOR/88-361, is a legislated model of labour relations that allows for good faith representation of the interests of RCMP members, and good faith consideration of the SRR's representations by RCMP management. In order to establish a breach of s. 2(d), the Appellants need to prove not that the SRR is insufficiently independent in the *Wagner Act* sense. Rather, they must establish that their freedom of association is rendered meaningless because, in the absence of statutory regulation, (i) the SRR is not representing the membership in good faith, (ii) it is not acting in good faith in relation to management, or (iii) management is not considering the SRR's representations on important workplace issues in good faith. Based on the findings below, the Appellants have failed to do so.

> *Mounted Police Association of Ontario v Canada*, 2012 ONCA 363 at paras 128-131.

25. Particularly instructive at this juncture is this Court's treatment in *Fraser* of another legislated alternative to *Wagner Act* collective bargaining, the *Agricultural*

Employees Protection Act (AEPA), which adopts a less-formal collective bargaining regime to take account of the special characteristics of the farm sector. This Court found that the AEPA, properly construed, protects the right to a process of collective bargaining under s. 2(d). The AEPA notably lacks key features of the *Wagner Act* model, such as (i) the imposition on both employer and bargaining agent of a full-fledged duty to bargain in good faith, enforceable before the labour board, (ii) labour board oversight and certification of the majority-supported union as exclusive bargaining agent, and (iii) a statutory remedy for bargaining impasse. Items (i) and (ii) found in the *Wagner Act* model are directly relevant to the question of the association's good faith *vis-à-vis* both employees and the employer, but neither was judged essential to the AEPA's compliance with the s. 2(d) right. This is despite the explicit argument made by the union in that case that *only* a trade union selected by the majority of workers in a labour-board supervised vote and then certified by the labour board as the exclusive bargaining agent for all employees can be considered the legitimate, truly independent representative of the employees. This argument was rightly, and wisely, rejected, and this Court focused on the real issues necessary to make the *Charter*-protected right meaningful for the employees in association: the making and consideration of representations in good faith.

> *Fraser v Ontario (Attorney General)* (2006), 79 OR (3d) 219 at para 5 (SCJ).
>
> *Fraser v Ontario (Attorney General)*, 2008 ONCA 760 at paras 80-96.
>
> *Fraser*, *supra* at paras 46-47, per McLachlin CJC and Lebel J.

26. There are other instructive examples. Purely non-statutory, informal models can instantiate the constitutional right to a process of collective bargaining. In Ontario, Commissioned Officers of the Ontario Provincial Police, Crown Attorneys and Crown counsel, as well as public school principals and vice-principals pursue non-statutory

collective bargaining in good faith with, in the case of principals and vice-principals, their school boards and, in the other cases, the government employer.

27. Such informal models, not embodied in any legislation, reflect this Court's judgment in *Delisle*, the precursor to the present case. In *Delisle*, this Court endorsed as *Charter*-compliant non-statutory forms of employee representation for the RCMP. As this Court noted, where the employer is the government, the government is already bound to s. 2(d) in its relationship with the employees in association, so access to a statutory regime is not required to protect the association's members from breaches of s. 2(d) by government. In such models, the question of an association's good faith *vis-à-vis* its membership and *vis-à-vis* the employer is not governed by legislative machinery and would, in general, be expected to be self-regulating. Such self-regulation mechanisms are, typically, in respect of the membership, the association's constitution or bylaws, and in respect of the employer, "framework" or "recognition" agreements. In the case of Ontario principals and vice-principals, a "Policy and Program Memorandum" issued by the Ministry of Education provides policy guidance for school boards in this regard. Despite the absence of regulation, it cannot be said that these models fail to offer workers a meaningful collective bargaining process.

> Policy/Program Memorandum No. 152, Issued February 12, 2012, "Terms and Conditions of Employment of Principals and Vice-Principals."

28. At the other end of the spectrum, Ontario's *Education Act* modifies the provincial *Labour Relations Act, 1995* which provides a process for the selection and certification of a bargaining agent. Instead, the *Education Act* prescribes that each teacher in specified categories (elementary/secondary, Catholic/public, French/English) *shall* be represented by the bargaining agent specified in the legislation. All English elementary teachers in the non-

denominational (i.e., non-Catholic) publicly funded system *must* be represented by the Elementary Teachers' Federation of Ontario (ETFO) and their secondary school counterparts by the Ontario Secondary School Teachers' Federation (OSSTF). Yet, despite this statutory prescription that departs materially from the *Wagner Act* model, experience shows that ETFO and OSSTF are legitimate and influential vehicles for the representation of their respective constituencies.

> *Education Act,* RSO 1990, c E2 ss. 277.1, 277.3, 277.4, 277.8.

Constitutional flexibility is the preferable approach

29. Looking beyond current domestic practice, it is clear that there are various models of collective bargaining around the world, and there may be different models in Canada and elsewhere in the future. Industrial relations is a dynamic field, both within Canada and in the global community and economy in which Canada actively participates and trades.

30. The Constitution should afford governments as much flexibility as possible to adopt, and adapt, different labour relations solutions to changing circumstances and varying contexts in a manner that nonetheless respects the s. 2(d) right to a process of good faith representation and good faith consideration.

31. Defining the section 2(d) right as a process of making and considering representations in good faith – at a high level of principled generality – ensures that the courts accord the legislatures sufficient leeway to formulate labour relations policy, respecting the Constitution whilst recognizing the variable and dynamic nature of labour relations. LeDain J's warning in the *Alberta Reference* against judicial micro-management, under the *Charter*, of labour policy remains as relevant today as in 1987.

> The rights for which constitutional protection is sought - the modern rights to bargain collectively and to strike, involving correlative duties or obligations

> resting on an employer - are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the Charter to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.

Alberta Reference, supra at para 142, per Le Dain J.

See also *Dunmore*, *supra* at para 57, per Bastarache J, and para 187, per L'Heureux-Dube J.

K. Banks, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism" (2011) 16 CLELJ 233 at 240.

32. As Chief Justice Dickson wrote in his dissent in the *Alberta Reference*, "The Constitution does not freeze into place an existing formula of industrial relations". This Court in both *Health Services* and *Fraser* has reiterated this important cautionary note.

Alberta Reference, *supra* at para 106, per Dickson CJC, dissenting.

Health Services, supra at para 91, per McLachlin CJC and Lebel J:

> The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. As P. A. Gall notes, it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years.

Fraser, supra at para 46, per McLachlin CJC and Lebel J:

> …no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.

33. The proliferation of litigation in the lower courts in the immediate aftermath of the *Health Services* decision demonstrates the difficulties that can be generated if the *Wagner Act* is treated as the litmus test for *Charter* s. 2(d) compliance. As a result of an imperfect understanding of *Health Services*, lower courts and tribunals across Canada struggled with

the question of whether aspects of the *Wagner Act* model are constitutionally required by s. 2(d). The Ontario Court of Appeal in *Fraser* held that a statutory duty to bargain, majoritarian exclusivity and a remedy for impasse were all constitutionally required. The Alberta Labour Relations Board in *Old Dutch Foods* held that the Rand Formula of compulsory salary deduction of union dues is required. In *Confédération des syndicats*, the Quebec Superior Court held that legislation rationalizing thousands of health care sector bargaining units was unconstitutional and in *Saskatchewan Federation of Labour* the Saskatchewan Queen's Bench found essential services legislation to infringe a constitutional right to strike that it reasoned was implied by *Health Services*.

> *Fraser v Ontario (Attorney General),* 2008 ONCA 760 at para 80.
>
> *Re Old Dutch Foods Ltd.,* [2009] ALBRD No 56 at para 58.
>
> *Confédération des syndicats nationaux c Québec (Procureur général),* 2007 QSSC 5513 at para 387.
>
> *Saskatchewan v Saskatchewan Federation of Labour,* 2012 SKQB 62 at paras 115, 280-282.
>
> See R.J. Adams, "Bewilderment and Beyond: A Comment on the Fraser Case," (2011) 16 CLELJ 313 at 313.

34. This Court's decision in *Fraser* made it abundantly clear that measuring impugned provisions against the *Wagner Act* model is not the correct approach. Rather, the question for a reviewing court should be whether the impugned measure renders the effective pursuit of workplace goals impossible – making freedom of association meaningless. Since *Fraser*, appeal courts have correctly held that important aspects of the *Wagner Act* model are not required:

- In *Independent Electricity System Operator v. Canadian Union of Skilled Workers*, the Court of Appeal for Ontario affirmed the Divisional Court and held that there is no right to be part of a specialized labour regime for the construction industry.

- In *Confederation des syndicats*, the Quebec Court of Appeal reversed the Superior Court and recognized that there is no constitutional right to have the contours of a bargaining unit determined by employee choice or, failing that, a labour board.
- In *Saskatchewan Federation of Labour*, the Saskatchewan Court of Appeal reversed the Queen's Bench and declined to hold that s. 2(d) protects the right to strike as part of the constitutionally protected process of collective bargaining.

> *Independent Electricity System Operator v Canadian Union of Skilled Workers*, 2012 ONCA 293 at para 89.
>
> *Quebec (Procureur General) c Confédération des syndicats nationaux*, 2011 QCCA 1247 at paras 87-93.
>
> *Saskatchewan v Saskatchewan Federation of Labour*, 2013 SKCA 43 at paras 54-60.

35. In these cases, the right sought was an element of the *Wagner Act* model of labour relations or a sector-specific variation thereof. In each case, the appeal court, applying *Fraser*, correctly found that the guarantee of freedom of association cannot be read to encompass the full panoply of statutory rights provided by labour relations regimes. To do so would foreclose the possibility of different models of labour relations being developed that meet the particular needs of a particular industry or workforce, or changing circumstances, which are matters within the particular competence of legislatures.

36. Commentators have also warned of the risks associated with entrenching elements of the *Wagner Act* model. Courts would be faced with the labour relations policy task of sifting through the elements of the *Wagner Act* model to determine which of them should be constitutionalized. Professor Kevin Banks has recognized the difficulty of doing this, as the *Wagner Act* model contains many interconnected parts that are mutually supportive, and finely balanced as between labour and management:

> First, the labour law model now found in all Canadian jurisdictions – the Wagner model – has many interdependent components and resists the identification of a small number of core elements. The certification of exclusive bargaining agents, combined with the legal duty to bargain, enables employees to require employers to bargain collectively without resorting to strikes or other industrial action. A regulated right to strike (limited to certain times, and restricted by a range of procedural prerequisites) is counterbalanced by the similarly regulated right of employers to lock out employees or unilaterally change terms of employment, permitting parties to exert influence on each other to reach an agreement. The legal enforceability of collective agreements through binding arbitration replaces the right to take industrial action to enforce the agreement. Prohibitions against discrimination and interference protect the independence of the negotiating parties and the freedom of employees and employers to choose to bargain collectively in the first place. The components of this system are closely interconnected, and they cannot be pulled apart without harming the capacity of the system to foster meaningful collective bargaining.
>
> K. Banks, "The Role and Promise of International Law" at 241-242.
>
> See also *Plourde, supra* at para 57, per Binnie J:
>
> Care must be taken not only to avoid upsetting the balance the legislature has struck in the [Labour] Code taken as a whole, but not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually.

37. In a similar vein, Professor Brian Langille has expressed concern that *Health Services* would be taken as a signal for the courts to embark upon a project of fashioning a "constitutional labour code" to run in parallel with existing statutory models.

> B. Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009), 54 McGill LJ 177 at 179-180, 202-203.

38. A further problem has been identified by industrial relations experts. Even if the elements of the *Wagner Act* could be separated out, and a court were able to evaluate which elements should be constitutionalized, the fact is that it is not the dominant model of labour relations around the world, and is of declining significance in the majority of workplaces in North America, especially in the private sector. Professor Roy Adams has pointed out that the Canadian model of majoritarian exclusivity does not exist in many industrialized democracies, and that minority unions coexist within a single workplace. Professor David

Doorey comments that the long decline of Wagnerism signals the need to open up consideration of alternatives like the approach upheld in *Fraser*.

> R.J. Adams, "Bewilderment and Beyond", *supra* at 324-327.
>
> D.J. Doorey, "Graduated Freedom of Association and Worker Voice in Labour Law" (Spring 2013) 38:2 Queen's LJ 511 at 513-518.
>
> M. Harcourt and H. Lam, "Union Certification: A Critical Analysis and Proposed Alternative", (2007) 10 WorkingUSA: The Journal of Labour and Society 327 at 337-338.

39. Others have noted that the *Wagner Act* rests on an oppositional conception of labour relations – hence its strict and highly regulated independence requirements. To constitutionalize this model could foreclose the possibility of recognizing more collaborative models of labour relations.

> R. P. Chaykowski, "Canadian Labour Policy in the Aftermath of Fraser" (2011) 16 CLELJ 291 at 300-302, 304.
>
> See also M. Harcourt and H. Lam, "Collaboration Between Unions in a Multi-Union, Non-Exclusive Bargaining Regime: What Can Canada Learn from New Zealand" (2012) 20:2 IJES at 8-10, 26 ["Collaboration Between Unions"].
>
> M. Harcourt and H. Lam, "Non-Majority Union Representation Conforms to ILO Freedom of Association Principles and (Potentially) Promotes Inter-Union Collaboration: New Zealand Lessons for Canada" (Spring 2011) 43:1 Dal LJ 115 at 121-123.

40. Alternatives to the *Wagner Act* can provide for a meaningful process through which workers can make representations to their employers, and many such models rely on principles of good faith, whether explicitly or implicitly. In systems founded upon the principle of *voluntary* collective bargaining on the part of both management and trade unions (see ILO Convention No. 98), good faith issues can be self-regulating.

41. Many models do not include the *Wagner Act's* requirements, or include only some of them. Each of these models supports the freedom of individuals to act in association with others to pursue common objectives and goals in their working lives.

42. Professors Mark Harcourt and Helen Lam argue that the minority/plural union model in New Zealand – which does not require unions to demonstrate majority support in a workplace before they are entitled to collectively bargain on behalf of their members, and does not provide unions with exclusive representation rights – nonetheless offers an effective model for worker representation and fosters collaboration among union leaders as they bargain, organize and advocate for policy change. Notably, Professor Harcourt observes that New Zealand's *lack* of strict independence requirements (which can permit "company-sponsored" associations to register under New Zealand law) might reduce regulatory barriers to employee representation.

> M. Harcourt and H. Lam, "Collaboration Between Unions", *supra* at 26.
>
> M. Harcourt and P. Haynes, "Accommodating Minority Unionism: Does the New Zealand Experience Provide Options for Canadian Law Reform?" (2011) 16 Canadian Lab. & Emp LJ 51 at 58-60.
>
> *Meat & Related Trades Workers Union of Aotearoa Inc v. Te Kuiti Beef Workers Union Incorporated,* (2001) 1 NZELR 299, (2002) 6 NZELC 96,473.
>
> M. Harcourt, "How Minority Unionism Works in New Zealand," (delivered at the University of Saskatchewan Faculty of Law Conference on Freedom of Association, February 25-27, 2010) [unpublished] at 3-4. Cited with permission.

43. Professor Matthew Dimick notes that high levels of unionization and an effective process for worker representation have emerged and been sustained in Sweden and Denmark without *Wagner*-style legislation, in part due to the incentive-based Ghent system. In a Ghent system, unions administer voluntary unemployment insurance funds on behalf of employees who wish to participate.

> M. Dimick, "Labor Law, New Governance and the Ghent System," (2012) 90:2 North Carolina L. Rev.

44. In Germany, Works Councils, which are distinct from unions, serve as the primary institutional mechanism for employee representation at the workplace level. Depending on

the issue at stake, Works Councils have a range of rights to be informed of, to participate in and even to co-determine some workplace policies. The Works Council's role is to work together with the employer in a spirit of mutual trust.

> L. Fulton. "Worker Representation in Europe: Germany" (2013). Labour Research Department, The European Trade Union Institute. Online publication available at: htttp://www.worker-participation.eu/National-Industrial-Relations.
>
> R. Page, "Co-Determination in Germany—A Beginner's Guide," (June 2009) Hans Bockler Stiftung, Arbeitspapier 33 at 14-17.

45. In a similar vein, to return again to the domestic context, in Canada many occupational health and safety statutes establish joint health and safety committees, comprised of both management and labour, which are charged with the responsibility of working collaboratively to identify and address workplace safety matters.

> E.g. *Occupational Health and Safety Act,* RSO 1990 c O1, s 9.

46. All of these efforts embody different approaches towards realizing the values that underpin this Court's recognition of a constitutional right to a process of collective bargaining.

47. Maintaining a high level of principled generality in the articulation of the constitutional requirement under s. 2(d) accommodates the variability of the models that may be adopted by legislatures, policy-makers and bargaining parties in Canada. Moreover it relieves the judiciary of the onerous task of designing a constitutional labour code.

48. This also has the virtue of permitting the judiciary to assess alleged constitutional infringements with a context-sensitive, case-by-case approach suitable to the adjudicative function of the courts, rather than by applying a "one-size-fits-all" template.

49. As recognized by this Court in *Fraser* and by the Court of Appeal below in the present appeal, the fact-specific question in each case will be whether the impugned

government action substantially impairs the ability of employees to associate for the purposes of making representations in good faith to their employer and having the employer consider the representations in good faith, thereby making their freedom of association meaningless.

Fraser, *supra* at paras 46-47, per McLachlin CJC and Lebel J.

Mounted Police Association of Ontario, supra at para 83.

50. In the present appeal, the lower courts' finding of good faith on the part of the associations in making the representations, and on the part of the employer in receiving and considering them, is determinative.

PART IV – COSTS

51. Ontario does not seek costs, nor should costs be ordered against it.

PART V – RELIEF REQUESTED

52. Ontario asks that the constitutional questions be answered as in paragraph 7 hereof.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF AUGUST, 2013

____________________	____________________
Robin K. Basu	**Michael Dunn**

Of counsel for the Intervener, Attorney General of Ontario

PART VI – TABLE OF AUTHORITIES

Caselaw

		Cited at paras.
1.	*Confédération des syndicats nationaux c Québec (Procureur général),* 2007 QSSC 5513	**33**
2.	*Delisle v Canada (Deputy Attorney General),* [1999] 2 SCR 989	**18**
3.	*Dunmore v Ontario (Attorney General),* 2001 SCC 94	**18, 31**
4.	*Fraser v. Ontario (Attorney General)* (2006), 79 OR (3d) 219 (SCJ)	**25**
5.	*Fraser v. Ontario (Attorney General)*, 2008 ONCA 760	**25, 33**
6.	*Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27	**11, 14, 18, 19, 21, 32**
7.	*Independent Electricity System Operator v Canadian Union of Skilled Workers*, 2012 ONCA 293	**34**
8.	*Meat & Related Trades Workers Union of Aotearoa Inc v. Te Kuiti Beef Workers Union Incorporated* (2001) 1 NZELR 299, (2002), 6 NZELC 96,473	**42**
9.	*Mounted Police Association of Ontario v Canada (Attorney General)*, 2012 ONCA 363	**24, 49**
10.	*Ontario (Attorney General) v Fraser*, 2011 SCC 20	**11, 18, 20, 21, 23, 25, 32, 49**
11.	*Plourde v Wal-Mart Canada Corp.,* 2009 SCC 54	**18, 36**
12.	*Québec (Procureur Général) c Confédération des syndicats nationaux (CSN)*, 2011 QCCA 1247	**34**
13.	*R v Advance Cutting & Coring Ltd* 2001 SCC 70	**18**
14.	*Re Old Dutch Foods Ltd.,* [2009] ALBRD No 56	**33**
15.	*Re: Public Service Employee Relations Act (Alberta Reference),* [1987] 1 SCR 313	**18, 31, 32**
16.	*Saskatchewan v Saskatchewan Federation of Labour,* 2012 SKQB 62	**33**
17.	*Saskatchewan v Saskatchewan Federation of Labour*, 2013 SKCA 43	**34**

18.	B. Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009), 54 McGill LJ 177	**37**
19.	D.J. Doorey, “Graduated Freedom of Association and Worker Voice in Labour Law” (Spring 2013) Queen’s LJ 38:2 511	**38**
20.	K. Banks, The Role and Promise of International Law in Canada’s New Labour Law Constitutionalism, 16 CLELJ 233 (2011) at p. 240-242	**31, 36**
21.	L. Fulton, “Worker Representation in Europe: Germany” (2013). Labour Research Department, The European Trade Union Institute. Online publication available at: htttp://www.worker-participation.eu/National-Industrial-Relations	**44**
22.	M. Harcourt, “How Minority Unionism Works in New Zealand,” (Paper, delivered at the University of Saskatchewan Faculty of Law Conference on Freedom of Association: harmonizing Canadian norms with international commitments, February 25-27, 2010)	**42**
23.	M. Harcourt and H. Lam, “Collaboration Between Unions in a Multi-Union, Non-Exclusive Bargaining Regime: What Can Canada Learn from New Zealand” (2012) IJES 20:2 at 9-10	**39, 42**
24.	M. Harcourt and H. Lam, “Non-Majority Union Representation Conforms to ILO Freedom of Association Principles and (Potentially) Promotes Inter-Union Collaboration: New Zealand Lessons for Canada” (Spring 2011) Dal LJ 43:1 115 at 121-123	**39**
25.	M. Harcourt and H. Lam, “Union Certification: A Critical Analysis and Proposed Alternative”, (2007) WorkingUSA: The Journal of Labour and Society Vol. 10, 327	**38**
26.	M. Harcourt and P. Haynes, “Accommodating Minority Unionism: Does the New Zealand Experience Provide Options for Canadian Law Reform?” (2011) 16 Canadian Lab. & Emp. L.J. 51 at 58-60	**42**
27.	M. Dimick, “Labor Law, New Governance and the Ghent System,” (2012) North Carolina L. Rev. 90:20	**43**
28.	Policy/Program Memorandum No. 152, Issued February 12, 2012, “Terms and Conditions of Employment of Principals and Vice-Principals	**27**
29.	R. J. Adams, “Bewilderment and Beyond: A Comment on the Fraser Case,” (2011) 16 CLELJ 313 at p. 313, 325	**33, 38**

30. R. P. Chaykowski, "Canadian Labour Policy in the Aftermath of Fraser" (2011) 16 CLELJ 291 at 300 **39**

31. R. Page, "Co-Determination in Germany—A Beginner's Guide," (June 2009) Hans Bockler Stiftung, Arbeitspapier 33, at p 14-17 **44**

PART VII – LEGISLATION AT ISSUE

		Cited at paras.
1.	*Education Act,* RSO 1990, c E2 ss. 277.1, 277.3, 277.4, 277.8	**28**
2.	*Labour Relations Act,* 1995, ss. 1, 7, 8, 8.1, 9, 10, 17 and 74	**16, 17, 21**
3.	*Occupational Health and Safety Act,* RSO 1990 c O1, s. 9	**45**

Education Act

R.S.O. 1990, CHAPTER E.2

…

PART X.1
TEACHERS' COLLECTIVE BARGAINING

Interpretation

277.1 (1) In this Part,

"designated bargaining agent" for a teachers' bargaining unit means the bargaining agent described in subsection 277.3 (2), 277.4 (3) or (4) as the bargaining agent for the unit; ("agent négociateur désigné")

"Part X.1 teacher" means a teacher employed by a board to teach but does not include a supervisory officer, a principal, a vice-principal or an instructor in a teacher-training institution; ("enseignant visé par la partie X.1")

"person" includes a designated bargaining agent and a trade union; ("personne")

"teachers' bargaining unit" means a bargaining unit described in subsection 277.3 (1), 277.4 (1) or (2) or 277.7 (1). ("unité de négociation d'enseignants") 1997, c. 31, s. 122.

Same

(2) Unless a contrary intention appears, expressions used in this Act relating to collective bargaining have the same meaning as in the *Labour Relations Act, 1995*. 1997, c. 31, s. 122.

…

Teachers' bargaining units, district school boards

277.3 (1) Each district school board has the following bargaining units:

1. One bargaining unit composed of every Part X.1 teacher, other than occasional teachers, who is assigned to one or more elementary schools or to perform duties in respect of such schools all or most of the time.

2. One bargaining unit composed of every Part X.1 teacher who is an occasional teacher and who is on the board's roster of occasional teachers who may be assigned to an elementary school.

3. One bargaining unit composed of every Part X.1 teacher, other than occasional teachers, who is assigned to one or more secondary schools or to perform duties in respect of such schools all or most of the time.

4. One bargaining unit composed of every Part X.1 teacher who is an occasional teacher and who is on the board's roster of occasional teachers who may be assigned to a secondary school. 1997, c. 31, s. 122.

Designated bargaining agents

(2) The following bargaining agents represent the corresponding bargaining units:

1. For the elementary school teachers' unit at an English-language public district school board, the Elementary Teachers' Federation of Ontario is the bargaining agent.

2. For each of the secondary school teachers' units at an English-language public district school board, The Ontario Secondary School Teachers' Federation is the bargaining agent.

3. For every teachers' bargaining unit at an English-language separate district school board, The Ontario English Catholic Teachers' Association is the bargaining agent.

4. For every teachers' bargaining unit at a French-language district school board, l'Association des enseignantes et des enseignants franco-ontariens is the bargaining agent. 1997, c. 31, s. 122; R.S.O. 1990, c. E.2, s. 277.6 (1).

Teachers' bargaining units, school authorities

277.4 (1) Every school authority (other than a board established under section 68) has the following bargaining units:

1. One bargaining unit composed of every Part X.1 teacher, other than occasional teachers, who is assigned to teach pupils enrolled in a French-language instructional unit or to perform duties in respect of such instructional units all or most of the time.

2. One bargaining unit composed of every Part X.1 teacher who is an occasional teacher and who is on the school authority's roster of occasional teachers who may be assigned to teach pupils enrolled in a French-language instructional unit.

3. One bargaining unit composed of every Part X.1 teacher, other than occasional teachers, who is not assigned to teach pupils enrolled in a French-language instructional unit or to perform duties in respect of such instructional units all or most of the time.

4. One bargaining unit composed of every Part X.1 teacher who is an occasional teacher and who is on the school authority's roster of occasional teachers who may be assigned to teach pupils other than those enrolled in a French-language instructional unit. 1997, c. 31, s. 122.

Same

(2) Every board established under section 68 has the following bargaining units:

1. One bargaining unit composed of every Part X.1 teacher, other than occasional teachers, who is assigned to one or more elementary schools or to perform duties in respect of such schools all or most of the time.

2. One bargaining unit composed of every Part X.1 teacher who is an occasional teacher and who is on the board's roster of occasional teachers who may be assigned to an elementary school.

3. One bargaining unit composed of every Part X.1 teacher, other than occasional teachers, who is assigned to one or more secondary schools or to perform duties in respect of such schools all or most of the time.

4. One bargaining unit composed of every Part X.1 teacher who is an occasional teacher and who is on the board's roster of occasional teachers who may be assigned to a secondary school. 1997, c. 31, s. 122.

Designated bargaining agents

(3) The bargaining agent for a bargaining unit is each of the following organizations, acting jointly, that, on December 31, 1997, had a branch affiliate representing a member of the bargaining unit for collective bargaining purposes under the *School Boards and Teachers Collective Negotiations Act*:

1. L'Association des enseignantes et des enseignants franco-ontariens.

2. The Elementary Teachers' Federation of Ontario.

3. The Ontario English Catholic Teachers' Association.

4. Repealed: R.S.O. 1990, c. E.2, s. 277.6 (2).

5. The Ontario Secondary School Teachers' Federation. 1997, c. 31, s. 122; R.S.O. 1990, c. E.2, s. 277.6 (2).

Same

(4) Despite subsection (3), the bargaining agent for a bargaining unit described in paragraph 1 or 2 of subsection (1) is l'Association des enseignantes et des enseignants franco-ontariens. 1997, c. 31, s. 122.

…

Appropriate bargaining units, bargaining agents

277.8 (1) The teachers' bargaining units shall be deemed to be appropriate bargaining units. 1997, c. 31, s. 122.

Certification of bargaining agents

(2) Each designated bargaining agent shall be deemed to be certified as the bargaining agent for the corresponding bargaining unit as specified in subsection 277.3 (2), 277.4 (3) or (4) or 277.7 (1). 1997, c. 31, s. 122.

Same

(3) No trade union is entitled to apply for certification as the bargaining agent for a teachers' bargaining unit. 1997, c. 31, s. 122.

Same

(4) No person is entitled to apply for a declaration that a designated bargaining agent no longer represents the members of a teachers' bargaining unit. 1997, c. 31, s. 122.

Labour Relations Act, 1995

S.O. 1995, CHAPTER 1
Schedule A

Definitions

1. (1) In this Act,

"accredited employers' organization" means an organization of employers that is accredited under this Act as the bargaining agent for a unit of employers; ("association patronale accréditée")

53. "agriculture" includes farming in all its branches, including dairying, beekeeping, aquaculture, the raising of livestock including non-traditional livestock, furbearing animals and poultry, the production, cultivation, growing and harvesting of agricultural commodities, including eggs, maple products, mushrooms and tobacco, and any practices performed as an integral part of an agricultural operation, but does not include anything that was not or would not have been determined to be agriculture under section 2 of the predecessor to this Act as it read on June 22, 1994; ("agriculture")

54. "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them; ("unité de négociation")

55. "Board" means the Ontario Labour Relations Board; ("Commission")

56. "certified council of trade unions" means a council of trade unions that is certified under this Act as the bargaining agent for a bargaining unit of employees of an employer; ("conseil de syndicats accrédité")

57. "collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement and does not include a project agreement under section 163.1; ("convention collective")

58. "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site; ("industrie de la construction")

59. "council of trade unions" includes an allied council, a trades council, a joint board and any other association of trade unions; ("conseil de syndicats")

60. "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor; ("entrepreneur dépendant")

61. "Director of Dispute Resolution Services" means the Director of Dispute Resolution Services in the Ministry of Labour or, if there ceases to be a public servant with that title, the public servant or servants who are assigned the duties formerly carried out by the Director of Dispute Resolution Services; ("directeur des Services de règlement des différends")

62. “employee” includes a dependent contractor; (“employé”)

63. “employers’ organization” means an organization of employers formed for purposes that include the regulation of relations between employers and employees and includes an accredited employers’ organization and a designated or accredited employer bargaining agency; (“association patronale”)

64. “lock-out” includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer’s employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees; (“lock-out”)

65. “member”, when used with reference to a trade union, includes a person who has applied for membership in the trade union; (“membre”)

66. “Minister” means the Minister of Labour; (“ministre”)

67. “professional engineer” means an employee who is a member of the engineering profession entitled to practise in Ontario and employed in a professional capacity; (“ingénieur”)

68. “strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output; (“grève”)

69. “trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency. (“syndicat”) 1995, c. 1, Sched. A, s. 1 (1); 1998, c. 8, s. 1; 2000, c. 38, s. 1; 2006, c. 35, Sched. C, s. 57 (1); 2009, c. 33, Sched. 20, s. 2 (1).

Same

(2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of the person’s ceasing to work for the person’s employer as the result of a lock-out or strike or by reason only of being dismissed by the person’s employer contrary to this Act or to a collective agreement. 1995, c. 1, Sched. A, s. 1 (2).

Same

(3) Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,

(a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity; or

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations. 1995, c. 1, Sched. A, s. 1 (3).

Same

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate. 1995, c. 1, Sched. A, s. 1 (4).

Duty of respondents

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation. 1995, c. 1, Sched. A, s. 1 (5).

…

ESTABLISHMENT OF BARGAINING RIGHTS BY CERTIFICATION

Application for certification

7. (1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may apply at any time to the Board for certification as bargaining agent of the employees in the unit. 1995, c. 1, Sched. A, s. 7 (1).

Same

(2) Where a trade union has been certified as bargaining agent of the employees of an employer in a bargaining unit and has not entered into a collective agreement with the employer and no declaration has been made by the Board that the trade union no longer represents the employees in the bargaining unit, another trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit determined in the certificate only after the expiration of one year from the date of the certificate. 1995, c. 1, Sched. A, s. 7 (2).

Same

(3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties and the parties have not entered into a collective agreement and the Board has not made a declaration under section 66, another trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the recognition agreement only after the expiration of one year from the date that the recognition agreement was entered into. 1995, c. 1, Sched. A, s. 7 (3).

Same

(4) Where a collective agreement is for a term of not more than three years, a trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last three months of its operation. 1995, c. 1, Sched. A, s. 7 (4); 2000, c. 38, s. 2 (1).

Same

(5) Where a collective agreement is for a term of more than three years, a trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the 34th month of its operation and before the commencement of the 37th month of its operation and during the three-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last three months of its operation, as the case may be. 2000, c. 38, s. 2 (2).

Same

(6) Where a collective agreement referred to in subsection (4) or (5) provides that it will continue to operate for a further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a

new agreement, a trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement during the further term or successive terms only during the last three months of each year that it so continues to operate, or after the commencement of the last three months of its operation, as the case may be. 1995, c. 1, Sched. A, s. 7 (6); 2000, c. 38, s. 2 (3).

Restriction

(7) The right of a trade union to apply for certification under this section is subject to subsections 10 (3) and 11.1 (4), section 67, subsections 128.1 (10), (15), (21), (22) and (23) and subsection 160 (3). 2005, c. 15, s. 1.

Withdrawal of application

(8) An application for certification may be withdrawn by the applicant upon such conditions as the Board may determine. 1995, c. 1, Sched. A, s. 7 (8).

Bar to reapplying

(9) Subject to subsection (9.1), if the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn. 1995, c. 1, Sched. A, s. 7 (9); 2000, c. 38, s. 2 (4).

Mandatory bar

(9.1) If the trade union withdraws the application before a representation vote is taken, and that trade union had withdrawn a previous application under this section not more than six months earlier, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year has elapsed after the second application was withdrawn. 2000, c. 38, s. 2 (5).

Exception

(9.2) Subsection (9.1) does not apply if the trade union that withdrew the application is a trade union that the Board is prohibited from certifying under section 15. 2000, c. 38, s. 2 (5).

Same

(9.3) Despite subsection (9.1), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made. 2000, c. 38, s. 2 (5).

Same

(10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is withdrawn. 2000, c. 38, s. 2 (6).

Same

(10.1) Despite subsection (10), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made. 2000, c. 38, s. 2 (6).

Exception

(10.2) Subsection (10) does not apply if the trade union that withdrew the application is a trade union that the Board is prohibited from certifying under section 15. 2000, c. 38, s. 2 (6).

Notice to employer

(11) The trade union shall deliver a copy of the application for certification to the employer by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board. 1995, c. 1, Sched. A, s. 7 (11).

Proposed bargaining unit

(12) The application for certification shall include a written description of the proposed bargaining unit including an estimate of the number of individuals in the unit. 1995, c. 1, Sched. A, s. 7 (12).

Evidence

(13) The application for certification shall be accompanied by a list of the names of the union members in the proposed bargaining unit and evidence of their status as union members, but the trade union shall not give this information to the employer. 1995, c. 1, Sched. A, s. 7 (13).

Same

(14) If the employer disagrees with the description of the proposed bargaining unit, the employer may give the Board a written description of the bargaining unit that the employer proposes and shall do so within two days (excluding Saturdays, Sundays and holidays) after the day on which the employer receives the application for certification. 1995, c. 1, Sched. A, s. 7. 1995, c. 1, Sched. A, s. 7 (14).

Voting constituency

8. (1) Upon receiving an application for certification, the Board may determine the voting constituency to be used for a representation vote and in doing so shall take into account,

(a) the description of the proposed bargaining unit included in the application for certification; and

(b) the description, if any, of the bargaining unit that the employer proposes.

Direction re representation vote

(2) If the Board determines that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appear to be members of the union at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency. 1995, c. 1, Sched. A, s. 8 (1, 2).

Membership in trade union

(3) The determination under subsection (2) shall be based only upon the information provided in the application for certification and the accompanying information provided under subsection 7 (13). 1998, c. 8, s. 2.

No hearing

(4) The Board shall not hold a hearing when making a decision under subsection (1) or (2).

Timing of vote

(5) Unless the Board directs otherwise, the representation vote shall be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application for certification is filed with the Board.

Conduct of vote

(6) The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made.

Sealing of ballot box, etc.

(7) The Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs.

Subsequent hearing

(8) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to dispose of the application for certification.

Exception

(9) When disposing of an application for certification, the Board shall not consider any challenge to the information provided under subsection 7 (13). 1995, c. 1, Sched. A, s. 8 (4-9).

Disagreement by employer with union's estimate

8.1 (1) If the employer disagrees with the trade union's estimate, included in the application for certification, of the number of individuals in the unit, the employer may give the Board a notice that it disagrees with that estimate. 1998, c. 8, s. 3.

Content of notice

(2) A notice under subsection (1) must include,

(a) the description of the bargaining unit that the employer proposes or a statement that the employer agrees with the description of the bargaining unit included in the application for certification;

(b) the employer's estimate of the number of individuals in the bargaining unit described in the application for certification; and

(c) if the employer proposes a different bargaining unit from that described in the application for certification, the employer's estimate of the number of individuals in the bargaining unit the employer proposes. 1998, c. 8, s. 3.

Deadline for notice

(3) A notice under subsection (1) must be given within two days (excluding Saturdays, Sundays and holidays) after the day on which the employer receives the application for certification. 1998, c. 8, s. 3.

Sealing of ballot boxes

(4) If the Board receives a notice under subsection (1), the Board shall direct that the ballot boxes from the representation vote be sealed unless the trade union and the employer agree otherwise. 1998, c. 8, s. 3.

Board determinations, etc.

(5) The following apply if the Board receives a notice under subsection (1):

1. The Board shall not certify the trade union as the bargaining agent or dismiss the application for certification except as allowed under paragraph 2 or as required under paragraph 8.

2. If the Board did not direct that the ballot boxes be sealed, the Board may dismiss the application for certification.

3. Unless the Board dismisses the application as allowed under paragraph 2, the Board shall determine whether the description of the bargaining unit included in the application for certification could be appropriate for collective bargaining. The determination shall be based only upon that description.

4. If the Board determines that the description of the bargaining unit included in the application for certification could be appropriate for collective bargaining, the Board shall determine the number of individuals in the unit as described in the application.

5. If the Board determines that the description of the bargaining unit included in the application for certification could not be appropriate for collective bargaining,

i. the Board shall determine, under section 9, the unit of employees that is appropriate for collective bargaining, and

ii. the Board shall determine the number of individuals in that unit.

6. After the Board's determination of the number of individuals in the unit under paragraph 4 or 5, the Board shall determine the percentage of the individuals in the bargaining unit who appear to be members of the union at the time the application for certification was filed, based upon the Board's determination under paragraph 4 or 5 and the information provided under subsection 7 (13).

7. If the percentage determined under paragraph 6 is less than 40 per cent, the Board shall dismiss the application for certification and, if the ballot boxes were sealed, the Board shall direct that the ballots be destroyed without being counted.

8. If the percentage determined under paragraph 6 is 40 per cent or more,

i. if the ballot boxes were sealed, the Board shall direct that the ballot boxes be opened and the ballots counted, subject to any direction the Board has made under subsection 8 (7), and

ii. the Board shall either certify the trade union or dismiss the application for certification. 1998, c. 8, s. 3; 2000, c. 38, s. 3.

Board to determine appropriateness of units

9. (1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

Certification pending resolution of composition of bargaining unit

(2) Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

Crafts units

(3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other

employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union practice are commonly associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

Units of professional engineers

(4) A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of the professional engineers wish to be included in the bargaining unit.

Dependent contractors

(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of the dependent contractors wish to be included in the bargaining unit. 1995, c. 1, Sched. A, s. 9.

Certification after representation vote

10. (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union. 1995, c. 1, Sched. A, s. 10 (1).

No certification

(2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union. 1995, c. 1, Sched. A, s. 10 (2).

Bar to reapplying

(3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is dismissed. 2000, c. 38, s. 4.

Same

(3.1) Despite subsection (3), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made. 2000, c. 38, s. 4.

Exception

(3.2) Subsection (3) does not apply if the trade union whose application was dismissed is a trade union that the Board is prohibited from certifying under section 15. 2000, c. 38, s. 4.

Same

(4) For greater certainty, subsection (3) does not apply with respect to a dismissal under paragraph 7 of subsection 8.1 (5). 1998, c. 8, s. 4.

...

Obligation to bargain

17. The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement. 1995, c. 1, Sched. A, s. 17.

...

Duty of fair representation by trade union, etc.

74. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be. 1995, c. 1, Sched. A, s. 74.

Occupational Health and Safety Act

R.S.O. 1990, CHAPTER O.1

…

Joint health and safety committee

Application

9. (1) Subject to subsection (3), this section does not apply,

(a) to a constructor at a project at which work is expected to last less than three months; or

(b) to a prescribed employer or workplace or class of employers or workplaces. R.S.O. 1990, c. O.1, s. 9 (1).

Joint health and safety committee

A. (2) A joint health and safety committee is required,

(a) at a workplace at which twenty or more workers are regularly employed;

(b) at a workplace with respect to which an order to an employer is in effect under section 33; or

(c) at a workplace, other than a construction project where fewer than twenty workers are regularly employed, with respect to which a regulation concerning designated substances applies. R.S.O. 1990, c. O.1, s. 9 (2).

Minister's order

B. (3) Despite subsections (1) and (2), the Minister may, by order in writing, require a constructor or an employer to establish and maintain one or more joint health and safety committees for a workplace or a part thereof, and may, in such order, provide for the composition, practice and procedure of any committee so established. R.S.O. 1990, c. O.1, s. 9 (3).

Same

C. (3.1) Despite subsections (1) and (2), the Minister may, by order in writing, permit a constructor or an employer to establish and maintain one joint health and safety committee for more than one workplace or parts thereof, and may, in the order, provide for the composition, practice and procedure of any committee so established. 1994, c. 27, s. 120 (1).

Same

D. (3.2) In an order under subsection (3.1), the Minister may,

(a) provide that the members of a committee who represent workers may designate a worker at a workplace who is not a member of the committee to inspect the physical condition of the workplace under subsection 9 (23) and to exercise a committee member's rights and responsibilities under clause 43 (4) (a) and subsections 43 (7), (11) and (12); and

(b) require the employer to provide training to the worker to enable the worker to adequately perform the tasks or exercise the rights and responsibilities delegated by the committee. 2001, c. 9, Sched. I, s. 3 (3).

Same

E. (3.3) If a worker is designated under clause (3.2) (a), the following apply:

70. 1. The designated worker shall comply with this section as if the worker were a committee member while exercising a committee member's rights and responsibilities.

71. 2. Subsections 9 (35) and 43 (13), section 55, clauses 62 (5) (a) and (b) and subsection 65 (1) apply to the designated worker as if the worker were a committee member while the worker exercises a committee member's rights and responsibilities.

72. 3. The worker does not become a member of the committee as a result of the designation. 2001, c. 9, Sched. I, s. 3 (3).

Establishment of committee

F. (4) The constructor or employer shall cause a joint health and safety committee to be established and maintained at the workplace unless the Minister is satisfied that a committee of like nature or an arrangement, program or system in which the workers participate was, on the 1st day of October, 1979, established and maintained pursuant to a collective agreement or other agreement or arrangement and that such committee, arrangement, program or system provides benefits for the health and safety of the workers equal to, or greater than, the benefits to be derived under a committee established under this section. R.S.O. 1990, c. O.1, s. 9 (4); 1993, c. 27, Sched.

What Minister shall consider

G. (5) In exercising the power conferred by subsection (3) or (3.1), the Minister shall consider,

(a) the nature of the work being done;

(b) the request of a constructor, an employer, a group of the workers or the trade union or trade unions representing the workers in a workplace;

(c) the frequency of illness or injury in the workplace or in the industry of which the constructor or employer is a part;

(d) the existence of health and safety programs and procedures in the workplace and the effectiveness thereof; and

(e) such other matters as the Minister considers advisable. R.S.O. 1990, c. O.1, s. 9 (5); 1994, c. 27, s. 120 (2).

Composition of committee

H. (6) A committee shall consist of,

(a) at least two persons, for a workplace where fewer than fifty workers are regularly employed; or

(b) at least four persons or such greater number of people as may be prescribed, for a workplace where fifty or more workers are regularly employed. R.S.O. 1990, c. O.1, s. 9 (6).

Idem

I. (7) At least half the members of a committee shall be workers employed at the workplace who do not exercise managerial functions. R.S.O. 1990, c. O.1, s. 9 (7).

Selection of members

J. (8) The members of a committee who represent workers shall be selected by the workers they are to represent or, if a trade union or unions represent the workers, by the trade union or unions. R.S.O. 1990, c. O.1, s. 9 (8).

Idem

K. (9) The constructor or employer shall select the remaining members of a committee from among persons who exercise managerial functions for the constructor or employer and, to the extent possible, who do so at the workplace. R.S.O. 1990, c. O.1, s. 9 (9).

Requirement for committee membership

L. (10) A member of the committee who ceases to be employed at the workplace ceases to be a member of the committee. R.S.O. 1990, c. O.1, s. 9 (10).

Committee to be co-chaired

M. (11) Two of the members of a committee shall co-chair the committee, one of whom shall be selected by the members who represent workers and the other of whom shall be selected by the members who exercise managerial functions. R.S.O. 1990, c. O.1, s. 9 (11).

Certification requirement

N. (12) Unless otherwise prescribed, a constructor or employer shall ensure that at least one member of the committee representing the constructor or employer and at least one member representing workers are certified members. R.S.O. 1990, c. O.1, s. 9 (12).

Idem

O. (13) Subsection (12) does not apply with respect to a project where fewer than fifty workers are regularly employed or that is expected to last less than three months. R.S.O. 1990, c. O.1, s. 9 (13).

Designation of member to be certified

P. (14) If no member representing workers is a certified member, the workers or the trade unions who selected the members representing workers shall select from among them one or more who are to become certified. R.S.O. 1990, c. O.1, s. 9 (14).

Designation of certified members

Q. (15) If there is more than one certified member representing workers, the workers or the trade unions who selected the members representing workers shall designate one or more certified members who then become solely entitled to exercise the rights and required to perform the duties under this Act of a certified member representing workers. R.S.O. 1990, c. O.1, s. 9 (15).

Idem

R. (16) If there is more than one certified member representing the constructor or employer, the constructor or employer shall designate one or more of them who then become solely entitled to exercise the rights and required to perform the duties under this Act of a certified member representing a constructor or an employer. R.S.O. 1990, c. O.1, s. 9 (16).

Replacement of certified member

S. (17) If a certified member resigns or is unable to act, the constructor or employer shall, within a reasonable time, take all steps necessary to ensure that the requirement set out in subsection (12) is met. R.S.O. 1990, c. O.1, s. 9 (17).

Powers of committee

T. (18) It is the function of a committee and it has power to,

(a) identify situations that may be a source of danger or hazard to workers;

(b) make recommendations to the constructor or employer and the workers for the improvement of the health and safety of workers;

(c) recommend to the constructor or employer and the workers the establishment, maintenance and monitoring of programs, measures and procedures respecting the health or safety of workers;

(d) obtain information from the constructor or employer respecting,

(i) the identification of potential or existing hazards of materials, processes or equipment, and

(ii) health and safety experience and work practices and standards in similar or other industries of which the constructor or employer has knowledge;

(e) obtain information from the constructor or employer concerning the conducting or taking of tests of any equipment, machine, device, article, thing, material or biological, chemical or physical agent in or about a workplace for the purpose of occupational health and safety; and

(f) be consulted about, and have a designated member representing workers be present at the beginning of, testing referred to in clause (e) conducted in or about the workplace if the designated member believes his or her presence is required to ensure that valid testing procedures are used or to ensure that the test results are valid. R.S.O. 1990, c. O.1, s. 9 (18).

Idem

U. (19) The members of the committee who represent workers shall designate one of them who is entitled to be present at the beginning of testing described in clause (18) (f). R.S.O. 1990, c. O.1, s. 9 (19).

Powers of co-chairs

V. (19.1) If the committee has failed to reach consensus about making recommendations under subsection (18) after attempting in good faith to do so, either co-chair of the committee has the power to make written recommendations to the constructor or employer. 2011, c. 11, s. 7 (1).

Response to recommendations

W. (20) A constructor or employer who receives written recommendations from a committee or co-chair shall respond in writing within twenty-one days. R.S.O. 1990, c. O.1, s. 9 (20); 2011, c. 11, s. 7 (2).

Idem

X. (21) A response of a constructor or employer under subsection (20) shall contain a timetable for implementing the recommendations the constructor or employer agrees with and give reasons why the constructor or employer disagrees with any recommendations that the constructor or employer does not accept. R.S.O. 1990, c. O.1, s. 9 (21).

Minutes of proceedings

Y. (22) A committee shall maintain and keep minutes of its proceedings and make the same available for examination and review by an inspector. R.S.O. 1990, c. O.1, s. 9 (22).

Inspections

Z. (23) Subject to subsection (24), the members of a committee who represent workers shall designate a member representing workers to inspect the physical condition of the workplace. R.S.O. 1990, c. O.1, s. 9 (23).

Idem

AA. (24) If possible, the member designated under subsection (23) shall be a certified member. R.S.O. 1990, c. O.1, s. 9 (24).

Idem

BB. (25) The members of a committee are not required to designate the same member to perform all inspections or to perform all of a particular inspection. R.S.O. 1990, c. O.1, s. 9 (25).

Idem

CC. (26) Unless otherwise required by the regulations or by an order by an inspector, a member designated under subsection (23) shall inspect the physical condition of the workplace at least once a month. R.S.O. 1990, c. O.1, s. 9 (26).

Idem

DD. (27) If it is not practical to inspect the workplace at least once a month, the member designated under subsection (23) shall inspect the physical condition of the workplace at least once a year, inspecting at least a part of the workplace in each month. R.S.O. 1990, c. O.1, s. 9 (27).

Schedule of inspections

EE. (28) The inspection required by subsection (27) shall be undertaken in accordance with a schedule established by the committee. R.S.O. 1990, c. O.1, s. 9 (28).

Inspections

FF. (29) The constructor, employer and the workers shall provide a member designated under subsection (23) with such information and assistance as the member may require for the purpose of carrying out an inspection of the workplace. R.S.O. 1990, c. O.1, s. 9 (29).

Information reported to the committee

GG. (30) The member shall inform the committee of situations that may be a source of danger or hazard to workers and the committee shall consider such information within a reasonable period of time. R.S.O. 1990, c. O.1, s. 9 (30).

Idem

HH. (31) The members of a committee who represent workers shall designate one or more such members to investigate cases where a worker is killed or critically injured at a workplace from any cause and one of those members may, subject to subsection 51 (2), inspect the place where the accident occurred and any machine, device or thing, and shall report his or her findings to a Director and to the committee. R.S.O. 1990, c. O.1, s. 9 (31).

Posting of names and work locations

II. (32) A constructor or an employer required to establish a committee under this section shall post and keep posted at the workplace the names and work locations of the committee members in a conspicuous place or places where they are most likely to come to the attention of the workers. R.S.O. 1990, c. O.1, s. 9 (32).

Meetings

JJ. (33) A committee shall meet at least once every three months at the workplace and may be required to meet by order of the Minister. R.S.O. 1990, c. O.1, s. 9 (33).

Entitlement to time from work

KK. (34) A member of a committee is entitled to,

(a) one hour or such longer period of time as the committee determines is necessary to prepare for each committee meeting;

(b) such time as is necessary to attend meetings of the committee; and

(c) such time as is necessary to carry out the member's duties under subsections (26), (27) and (31). R.S.O. 1990, c. O.1, s. 9 (34).

Entitlement to be paid

LL. (35) A member of a committee shall be deemed to be at work during the times described in subsection (34) and the member's employer shall pay the member for those times at the member's regular or premium rate as may be proper. R.S.O. 1990, c. O.1, s. 9 (35).

Idem

MM. (36) A member of a committee shall be deemed to be at work while the member is fulfilling the requirements for becoming a certified member and the member's employer shall pay the member for the time spent at the member's regular or premium rate as may be proper. R.S.O. 1990, c. O.1, s. 9 (36); 1998, c. 8, s. 50 (1); 2011, c. 11, s. 7 (3).

Exception

NN. (37) Subsection (36) does not apply with respect to workers who are paid by the Workplace Safety and Insurance Board for the time spent fulfilling the

requirements for becoming certified. R.S.O. 1990, c. O.1, s. 9 (37); 1998, c. 8, s. 50 (2).

Additional powers of certain committees

OO. (38) Any committee of a like nature to a committee established under this section in existence in a workplace under the provisions of a collective agreement or other agreement or arrangement between a constructor or an employer and the workers has, in addition to its functions and powers under the provisions of the collective agreement or other agreement or arrangement, the functions and powers conferred upon a committee by this section. R.S.O. 1990, c. O.1, s. 9 (38).

Dispute resolution

(39) Where a dispute arises as to the application of subsection (2), or the compliance or purported compliance therewith by a constructor or an employer, the dispute shall be decided by the Minister after consulting the constructor or the employer and the workers or the trade union or trade unions representing the workers. R.S.O. 1990, c. O.1, s. 9 (39).