

## **REGULATORY CONTROL OVER UNIVERSITIES, SCHOOLS & HOSPITALS**

### **Introduction**

This legal research paper is Phase I of a two phase research report with respect to the regulatory control that exists at the provincial level over certain public institutions - universities, schools (elementary and secondary) and hospitals. The focus in Phase I is on the regulatory regime in Ontario. Phase II will review similar regimes in selected other provinces.<sup>1</sup>

The intention in this legal research paper is to set out in summary format the regulatory regimes that apply to these public institutions.<sup>2</sup> This paper is to be used by the Joint Regulatory Table as part of its deliberations with respect to whether or not there is a logical basis for placing universities, schools and hospitals on a different footing from other government-funded charities.

Phase II of this research will extend the summary to other provinces. Before Phase II is started, it is necessary for the Joint Regulatory Table to determine:

- ⇒ does the format and content in this draft legal research paper meet its requirements? Is more detail required? Should other issues be addressed? For example, should private schools be included? Ontario has recently put in place a tax credit for private schools; other provinces fund private schools from consolidated revenue funds.<sup>3</sup>
- ⇒ what other provincial regulatory regimes should be covered? The regulation of

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<sup>1</sup> Because this document was considered sufficient for the Table's needs, it was decided not to proceed with Phase II of the study.

<sup>2</sup> The legal research paper does not review any privately-operated institutions, such as private schools.

<sup>3</sup> While not within the ambit of this paper, it is not clear how this tax credit will operate with respect to any receipts for income tax purposes that have been issued by private schools that are registered as charitable organizations under the *Income Tax Act*.

universities, schools and hospitals falls largely within provincial jurisdiction. Regulatory regimes will, of course, reflect the public interest and political dynamics within each province. Regulation is contextual in nature, but it is anticipated that the overall approaches will be similar.

Each provincial review is expected to require 2 to 3 days of research and preparation of a summary similar to the one contained in this draft paper. If greater detail is required, then additional time will also be required. The completed legal research paper would also include a highlight of the key differences in the regulatory regimes among the provinces selected for review.<sup>4</sup> Anticipated completion date for the final draft legal research paper is late June 2002. This paper reviews the statutory bases for universities, schools and public hospitals. Any regulatory regime would be derived from these statutes. The paper then discusses the role of the Public Guardian and Trustee and of the Provincial Auditor in reviewing these public institutions. This paper does not deal with various non-governmental bodies that provide accreditation or carry out reviews of the public institutions. These activities may be regulatory in nature but are not governmental for purposes of this paper.

Regulatory control can occur through several tools. These tools include:

- ⇒ restrictions on who may carry out certain functions or activities. This tool is in place for universities, public hospitals and school boards;
- ⇒ more detailed regulation of a sector which prescribes how a participant may carry out its functions or activities. This regulation may be active or passive in nature. For example, the regulatory measures may stipulate what and how the participant may act, but does not provide for any ongoing regulatory review or approval. On the other hand, the regulatory review may be more active and include ongoing permissions or approvals;
- ⇒ funding of the public institution, which funding may have terms and conditions attached to it that are formal or less formal;
- ⇒ moral suasion, understandings or common practices on how an institution is to carry out its functions and activities. Common practices or standards create expectations, although there is no specific legislative authority or only a vague authority to enforce them.

In general, the public institutions reviewed in this paper are on a spectrum. At the one end are universities which exercise their powers with a high degree of independence and few, if any, regulatory controls in the hands of a Minister or the Ministry of Training, Colleges and

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<sup>4</sup> For example, Alberta has opted for a regional health care management system in which the regional manager contracts with health care deliverers.

Universities. Funding seldom has explicit restrictions, other than to be used for purposes for which the grant was given. Ministers and the ministry have minimal legislative power to exercise and do not constrain the exercise by the universities of their own powers.

Public hospitals appear to be in the middle in this spectrum with a high level of control and prescribed standards or processes. While not all of the powers are necessarily used, the Minister and ministry have substantial power, whether it is exercised or not. However, given the nature of its activities, that would be expected in the public interest and is similar to other health care providers and regulated industries.

School boards, which used to operate with a much higher level of independence, are further along the spectrum than are public hospitals. There is a very high degree of control over budgets, what a school board may do and how it may do it. These controls exist not only in the legislation but also in practice.

## Universities

Universities have, historically, had a substantial degree of independence from government. In the post-war period, the expansion of universities and their importance to the overall economy of Canada meant that provincial governments and the federal government enhanced the level of public funds that were provided to universities for capital and operating expenses. In addition, programs to assist students to attend, such as student loan and grant programs, were established.

Universities in Ontario are authorized to grant degrees by the *Post-Secondary Education Choice and Excellence Act, 2000*.<sup>5</sup> This statute replaced the former *Degree Granting Act*. The *Degree Granting Act* had not permitted private universities but its replacement statute does. Government policy is, however, not to fund private universities from public funds, such as the consolidated revenue fund.<sup>6</sup> The private universities will be established, it is understood, pursuant to Minister's consents.<sup>7</sup>

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<sup>5</sup> S.O. 2000, c. 36, Sched.

<sup>6</sup> It is not clear, however, whether or not private universities will be for-profit businesses or not-for-profit in nature. It may be that certain private universities will be eligible for registration under the *Income Tax Act* as a charitable organization or with respect to scholarships.

<sup>7</sup> The Minister has not issued any consents to a person to grant degrees, although some are anticipated. The *Act* sets out an application process and authorizes the Minister to attach terms and conditions to any consent. The application is referred to the Post-secondary Education Quality Assessment Board, which carries out a review of the application and makes a recommendation to the Minister. The Minister may also appoint inspectors to determine whether or not it is appropriate to suspend or revoke a consent or to change the terms and conditions.

The *Post-Secondary Education Act* prohibits any person from granting a degree or providing a program or part of a program leading to a degree unless the person is authorized to do so by an Act of the legislative assembly or the Minister.<sup>8</sup> Historically, universities have been authorized to issue degrees and to provide programs towards a degree solely by a specific statute. To date, every publicly-funded university in Ontario is established and operates pursuant to its own private legislation, as amended over time.<sup>9</sup>

Universities operate pursuant to their own legislative mandate. Each university in Ontario is created by a private legislation. For purposes of this paper, the legislation continuing the University of Waterloo is used as an example. However, similar legislation is in place for all universities, including universities with a religious affiliation, such as St. Jerome's University. The University of Waterloo was established in 1959. Its original legislation was amended and subsequently repealed and replaced by *The University of Waterloo Act, 1972*, S.O. 1972, chap. 200. This statute:

- ⇒ continues the university as a corporation,
- ⇒ sets out its objects as the pursuit of learning through scholarship, teaching and research within a spirit of free enquiry and expression,
- ⇒ defines its powers
- ⇒ sets out its governance structure (board of governors, senate, president, chancellor and vice-chancellor) and their respective powers, terms and so forth,
- ⇒ requires the appointment of an auditor licensed under the *Public Accountancy Act* to audit the accounts and transactions;
- ⇒ requires that the board make available an annual report to students, faculty and staff, which includes an annual financial report,

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<sup>8</sup> Section 2 of the statute is more detailed than this summary and also permits a person to contract with a university for the delivery of programs, provided the university issues the degree.

<sup>9</sup> There are also several privately-funded institutions in Ontario that have private legislation authorizing them to issue degrees. They are smaller and have limited degree-granting authority. They do not receive operating or capital grants.

- ⇒ requires the board of governors to submit annually a financial report to the Minister in such form and containing such information as the Minister may require. The Minister is required to submit the report to the Lieutenant Governor in Council (Cabinet) and to table it in the Assembly.<sup>10</sup>

The Minister, as can be seen from the above summary, does not have any significant direct regulatory power over the University of Waterloo. The Minister has a right to financial information on an annual basis and can determine what information is required.

The Ministry of Training, Colleges and Universities has a general supervisory role over post-secondary education policy. Its objective is to ensure access for each qualified student to a high-quality, accessible and accountable program. It does so primarily by providing financial support that makes post-secondary education affordable (public funds to assist in the operating and capital expenses of the university and for student loans).<sup>11</sup>

The Ministry has established performance-based funding for universities. Key performance indicators are used to measure success in priority areas, such as employer and student satisfaction, and graduation and employment rates. Under this accountability program a university may receive slightly higher operating grants based on performance. Over time, the Ministry intends to increase the portion of operating grants awarded based on performance.

The essential regulatory tool for the Ministry would appear to be the use of operating and capital grants to encourage certain behaviour and performance by a university. There is also, of course, moral suasion, another typical but softer regulatory tool. However, neither the Minister nor the Ministry have legislative jurisdiction to regulate directly a university.<sup>12</sup>

The universities will also have other sources of revenue which may temper the ability of a Minister to exercise moral suasion. Universities will obtain funds from tuition and other fees charged to students, business operations (including lease payments from businesses on campus), investment income, endowment funds (including from Crown agencies that were created in the 1990s), contractual research and so forth.

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<sup>10</sup> Some statutes, such as the *Nipissing University Act*, S.O. 1992, chapter Pr52, may require the board of governors to submit other reports as required by the Minister.

<sup>11</sup> Business Plan 2001-2002, Ministry of Training, Colleges and Universities, page 3.

<sup>12</sup> The situation is different with respect to colleges of applied arts and technology (community colleges) which are Crown agents and fall under the jurisdiction of the Council of Regents. However, as Crown agents, these institutions would not be registered as charitable organizations.

## Public Hospitals

The *Public Hospitals Act* is the primary statute governing public hospitals in Ontario. Public hospitals are generally incorporated under the *Corporations Act* or by private legislation. No application for incorporation may proceed without the approval of the Minister of Health and Long Term Care.

The *Public Hospitals Act* prohibits the use of any building as a hospital unless the Minister has approved the operation or use of the premises for that purpose. The Minister's approval is required before the land, building or other premises are sold, leased, mortgaged or otherwise disposed of without the approval of the Minister. The Lieutenant Governor in Council (Cabinet) may suspend any such approval.

The *Act* authorizes the Minister to make payments to public hospitals by way of grant or loan. The Minister may impose terms and conditions on the financial assistance and may reduce the grant, loan or other financial assistance if it is in the public interest to do so.<sup>13</sup> Public hospitals are also subject to inspection by Ministry inspectors. The inspection powers are set out in the regulations under the *Act*.

The LGIC has broad powers to investigate and report on the quality of management and administration of a hospital, the quality of the care and treatment of patients and other related matters. The investigation may lead to the LGIC appointing a supervisor of the hospital who will act under the directions of the Minister. This authority would be used rarely in the public interest, such as to address a serious problem in the financial management of the hospital or where the care and treatment of patients is at risk.

The LGIC also has substantial powers to enact regulations related to governance matters, standards, inspection, administration and so forth. The most significant regulation enacted and in effect is a general one concerned with hospital management. The regulatory requirements are similar to those for other regulated industries.

The public hospital must put in place by-laws with respect to the management and operation of the board and hospital. These by-laws must be submitted to the Minister and approved by the LGIC on recommendation of the Minister. This power may provide the Minister with some direction or control over the public hospital, but only where the hospital would like a change to

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<sup>13</sup> The Minister also has significant powers that are related to the implementation of hospital restructuring. These powers are effectively time-limited and for specific purposes.

the by-law.

Public hospitals will receive substantial revenues from the consolidated revenue fund, either through payments under OHIP or from grants (operating and capital), which will be a substantial portion of overall revenues. Public hospitals have access to other sources of revenues, which may vary depending upon the location and the types of medical services provided. A number of hospitals are, for example, research hospitals with affiliations with universities or may be operated by universities. These hospitals may carry out research for private sector companies or using grants for that purpose from public funds.

Public hospitals may also earn income from various business operations - including parking fees, lease payments, investment income, subsidiaries and so forth. Many public hospitals also have foundations whose purpose is to provide financial support to one or more hospitals. In addition, the hospital itself may receive donations directly or through various volunteers committees. The Minister may require that hospital subsidiaries and hospital foundations provide financial reports and returns to the Minister. The Minister may also prescribe the accounting principles and rules to be followed in making the financial reports and returns.

In 2001, the role of the private sector in the construction and ownership of hospital buildings and equipment appears to have become a new government policy. The Minister may influence hospitals towards this model through the Minister's discretion over grants and loans and other financial assistance to public hospitals. It is not clear how this policy direction will play out, in particular with respect to the regulatory control over charities.

### **School Boards**

The *Education Act* governs elementary and secondary education in Ontario. Most students are enrolled in schools operated by a district school boards (English-language public, English-language Catholic, French-language public, French-language Catholic, Protestant) or district school authority. The Ministry of Education also operates directly or through agents schools for students with specified disabilities or for those in certain institutions, such as hospitals or young offender units.

Private schools are inspected but generally only at the secondary level. It is a requirement for the issuance of a high school diploma, which is necessary for most students to continue in their education. Until recently, no public funds were available for private school education but in 2001 tax credits were put in place with respect to tuition.

The *Education Act* has been a detailed statute for a long, reflecting the high priority society places on formal education. However, until the mid-1990s, school boards operated with a significant degree of independence. This independence was derived in large measure from the

ability to raise taxes. Although not all boards of education were able to raise sufficient funds to pay the expenses of education, most were able to come close to doing so. Provincial funding from the consolidated revenue fund made up shortfalls through grants.

This independence has largely disappeared for all practical purposes. Almost all funding is, in effect, provincial grants allocated by the Minister of Finance. The process is more complicated than this statement, the net impact is the same. Furthermore, boards must expend the funds obtained in accordance with a formula. Although a board has discretion within the formula, it is very limited. Board finances are highly restricted and prescriptive. With respect to its capital expenditures on schools and other buildings, the boards are similarly restricted with respect to development charges, when and where new schools may be constructed or older ones renovated.

The Minister of Education and the LGIC have very broad powers. Some of these powers are not new but have been more vigorously exercised in recent years. The following is intended to illustrate the degree of authority that rests in the Minister or the LGIC in controlling what and how district school boards and authorities carry out their functions.

The Minister, among other things, may:

- ⇒ prescribe courses of study,
- ⇒ determine diplomas and certificates to be issued,
- ⇒ issue curriculum guidelines and require their use in the development of courses of study
- ⇒ conduct reviews of classroom practices,
- ⇒ assess the academic achievement of pupils and establish policies and guidelines for the assessment by a board and require compliance with those policies and guidelines,
- ⇒ establish policies and guidelines with respect to the role and responsibilities of board members, directors of education, supervisory officers, principals, superintendents and other officials,
- ⇒ establish procedures and the conditions under which books and other learning materials are selected and approved by the Minister,
- ⇒ purchase and distribute textbooks and other learning materials for use in schools,
- ⇒ issue guidelines on school closings,
- ⇒ issue guidelines respecting pupil records and require compliance,
- ⇒ require boards to provide any report that the Minister may require,
- ⇒ prescribe the duties to be performed by the auditors appointed by the boards.

The Minister also has extensive powers to make regulations over a wide range of matters,

including (but by no means limited to):

- ⇒ with respect to the establishment, organization, administration and governance of schools and classes,
- ⇒ governing the admission of pupils,
- ⇒ prescribing records for pupils,
- ⇒ governing the provision, establishment, organization and administration of special education,
- ⇒ prescribing the accommodation and equipment of buildings,
- ⇒ governing school libraries.
- ⇒ listing the textbooks that are selected and approved for use in schools,
- ⇒ prescribing the powers, duties and qualifications and governing the appointment of teachers, supervisors, directors, supervisory officers, heads of departments, principals, superintendents, and other officials,
- ⇒ prescribing the duties of pupils,
- ⇒ governing the transportation of pupils,
- ⇒ prescribing and governing the school year, school terms, school holidays and instructional days.

The LGIC has very broad powers with respect to the establishment, dissolution and amalgamation of district school boards and authorities, representation and election to the boards.

The *Education Act* also provides a number of governance matters that are necessary, regardless of how a corporation is created. For example, it requires that a board appoint certain officers (treasurer, secretary, director of education and other officials). However, this *Act* goes into substantially more detail on how each of these officials are to carry out their functions than would occur in other circumstances.

The *Act* also permits the Minister to carry out reviews of boards, to carry out inspections and to provide directions. Most of these powers are not necessarily new and are present in other local government statutory regimes. There is a need to ensure that such bodies do what the legislature intended that they do, especially when public funds are being expended.

In many ways, district school boards and authorities have become administrative entities carrying out the policy directions of the Minister of Education, using almost solely funds made available by the Minister of Finance and doing so in accordance with the directions of the Minister or the LGIC. While it is increasingly difficult to see district school boards as charitable as opposed to governmental in nature. While the schools obviously advance education they do so with direct and indirect control of the Minister of Education, Minister of Finance and the LGIC.

## Public Guardian and Trustee

The authority of the Public Guardian and Trustee is derived from the *Charities Accounting Act* and the *Charitable Gifts Act*. The PGT does not, for the most part, regulate universities, public hospitals or school boards under these statutes. To the extent that either of these statutes apply to these public institutions, they do so no differently than other charitable organizations in Ontario. Furthermore, the PGT exercises its powers based on complaints, usually, and is reliant upon the courts to do so.

There is, however, an issue with respect to the extent of the application based upon the case law and whether or not specific statutory authority would take precedence over the general provisions in these two statutes. For example, section 9 of *The University of Waterloo Act* permits the university to invest in such investments as the Board of Governors shall deem suitable. Assuming that the *Charitable Gifts Act* applies to the University of Waterloo, it is not clear that the university would be prohibited from holding more than 10 per cent of the shares in a business. For public hospitals - and by logical extension, probably school boards - the highly regulated nature of the sector has displaced much of the *Charitable Gifts Act*.

## Provincial Auditor

The Provincial Auditor does not audit the books of account of a university, public hospital or school board. The Provincial Auditor's authority is derived from the *Audit Act*, which establishes the Provincial Auditor as an office of the Assembly. There have been several attempts, formal and informal, to expand the jurisdiction of the Provincial Auditor over public institutions, but these attempts have had limited success. For example, ministries that contract with a university to carry out research will usually include a right of the Provincial Auditor to audit the use of any funds.

The Provincial Auditor audits the disbursements made from the consolidated revenue fund. The intention is to ensure that the funds have been disbursed. It may undertake limited inspection audits of the grants. An inspection audit under section 13 of the *Audit Act* as an examination of the accounting records. It does not have the authority to do a value for money audit because only accounting records may be examined.

The Provincial Auditor does not have the power to audit these public institutions; that audit is carried out by the auditor appointed by the public institution under its incorporating legislation. The Provincial Auditor has right of access to the books and audits related to the various university foundations that were created because these are Crown foundations for purposes of the *Income Tax Act*.

There have been attempts in the past to authorize the Provincial Auditor to conduct more extensive audits, including value for money audits, of public institutions. In the 1997 Ontario Budget, the then Minister of Finance proposed a Public Sector Accountability Act. The Minister of Finance introduced a more expanded version as Bill 46 in 2001, but it has only received first reading.