

Between the Rock and a Hard Place: A Critical Discussion on the Changes in Governance Structures of Ontario Universities from the Perspective of Administrative Law

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Accountability is perhaps a protean concept, a placeholder for multiple contemporary issue in public service delivery. Public concern about the unaccountability of bureaucrats, public servants, and privatized governmental services have been on the rise since the public-private partnership model has become paramount during the last three decades. However, the question is *not* what accountability structures would suffice to assure the public that the spending of the public purse by a multitude of powerful actors is subject to effective oversight and control.

Our primary concern is about the changing nature of accountability regimes in Canadian administrative law and public service as it directly effects the quality of higher education and the semi-autonomous nature of the university system. In this context, the basic map of the choices available to institutional designers when addressing accountability questions is key.

The conceptual framework of accountability provides a grammar of governance, which is not just 'contracted out' but is to be shaped by the very institutions that are given the authority to provide public service. In this regard, accountability concerns that presumed 'contracting out' generates are misplaced. Within a framework of long-standing debates about the relative roles of government, institutions and administrative in pursuing the public good reveals a taxonomy of rights and duties, which cannot be monetized.

There is a troubling issue that lurks beneath the surface of this whole discussion: How should we assess the acceptability of particular accountability arrangements in the context of public education? The point here is not to suggest that we could solve accountability-related problems through clever institutional designs. Rather, we strive to understand the basic purposes of different forms of accountability in order to shed light on various accountability disputes effecting contemporary Canadian universities. For much of the dispute about accountability is in effect a dispute about what particular institutions are meant to do, and not how accountable they are in the doing what they are mandated to deliver.

This paper looks at the current legal status of the university system in Ontario with a view to examining how resistant it might be to the kind of pressures described above. Thus, we might ask if a change in the way accountability works within Ontario universities might somehow alter their mission and if so how that change might be affected. In other words, can changes under the guise of changes in accountability practice serve as a means for governments to alter the role of public universities.

In furtherance of this goal, we will be outlining the legal environment in which university education operates in Ontario. The focus will be on our institution, York University but most of this would also apply at least in part to other institutions in the province.

This analysis is for the purpose of examining the degree to which university independence is protected by law in Ontario. We are aware that the notion of independence is inherently problematic, at least in part because it can be difficult to define what is meant by independence. We do, however, have a little bit of jurisprudence on this question. Most notably, in *Dickason v. University of Alberta* Justice Cory, writing for the majority in support of the University's mandatory retirement system, noted that one of the objects of mandatory retirement was to support the tenure system, itself devised to support academic independence.¹ Thus, while independence may be problematic in general, it is the legal framework under which courts have considered university autonomy in Canada.

For the purposes of this paper, independence will mean free from direct administrative control by the provincial government and under the control of the institution. However, this is undoubtedly an oversimplification. For example, in analysing UNAM's degree of academic autonomy, Imanol Ordorika looked at three forms of autonomy:

- (a) political autonomy, including appointment of authorities and conflict resolution;
- (b) academic and campus autonomy; including access, academic freedom, and free speech; and
- (c) financial autonomy, including tuition and salary policies among other issues.²

Canadian case law has not done a great deal to unpack what university autonomy means in this country. From *Dickason*,³ however, we understand that the goal of institutional independence, itself perhaps a subset of autonomy, is to foster academic independence. To the extent that decisions about what courses and programs are offered and accredited, faculty members are hired, research is undertaken, and university policies are developed without intervention by the provincial government, they will be considered independent for our purposes. In practice, this means that these sorts

¹ *Dickason v. University of Alberta*, [1992] 2 SCR 1103, 1992 CanLII 30 (SCC), <<http://canlii.ca/t/1fs85>>, retrieved on 2019-05-14

² Imanol Ordorika "The limits of university autonomy: Power and politics at the Universidad Nacional Autónoma de México" *Higher Education* 46: 361–388, 2003 at 264-365

³ *Supra* note 1

of decisions must be made internally or by arms-length external bodies, but it also means that they can be influenced in a variety of ways by political decision-makers, something that we will address later in this section.

In Ontario, most universities owe their existence to legislation. In the case of York University, the operative piece of legislation is the *York Act*.⁴ Other institutions have similar establishing legislation, for example the University of Toronto, while initially composed of multiple institutions, it now operates under the authority of the *University of Toronto Act*.⁵ Queen's University is an exception operating under a Royal charter as amended by the Federal Parliament.⁶ From an administrative law standpoint, most Ontario universities are subordinate institutions created by the provincial legislature, with the exception of Queen's as noted above.

This sort of legislation creates self-governing institutions devoted to fulfilling broadly-construed educational goals. Using the *York Act* as an example, section 4 defines the University's goals as follows:

4. The objects and purposes of the University are,
 - (a) the advancement of learning and the dissemination of knowledge; and
 - (b) the intellectual, spiritual, social, moral and physical development of its members and the betterment of society.⁷

This type of governance structure has been identified by the courts as designed to protect academic independence, as discussed previously.⁸

Governance of the institution is broadly defined, with the Board of Governors established in s. 7 and its powers in s. 10. The University Senate is created by s. 11 and given broad powers to govern the academic life of the University.⁹

The purpose of this legislation is straight-forward: establish a self-governing institution administered by a Board of Governors with a Senate that makes most academic decisions. At York, this model is also reflected in internal faculty governance I, with individual faculty councils playing a similar role at the faculty level to that of the Senate.¹⁰

⁴ *The York University Act*, 1965, S.O. 1965, c. 143; see also *The York University Act*, 1959, S.O. 1959, c. 145.

⁵ *University of Toronto Act*, 1971, S.O. 1971.

⁶ Queen's Royal Charter, available via: <https://www.queensu.ca/encyclopedia/r/royal-charter-retrieved-May-8>, 2018

⁷ *Supra* note 4 s. 4

⁸ see *Dickanson supra* note 1 as well as *AlGhaithy v. University of Ottawa*, 2012 ONSC 142 (CanLII) at para. 76. *Dickanson* is contextualized in Cristin Schmitz "SCC Upholds University's Mandatory Retirement Rule," 12(23) *Lawyers Weekly* (October 16, 1992)

⁹ *Supra* note 4 s. 12

¹⁰ Rules of Senate <http://secretariat.info.yorku.ca/senate/> and, for example, Rules and Procedures of LA&PS Council <http://council.laps.yorku.ca/rules-and-procedures-of-council/> both retrieved 21 May 2019

The precise organization of various institutions differs, for example the University of Toronto is more complex because it developed as a federation of individual colleges,¹¹ but this pattern persists. While there are many possibilities for conflicts between elements of this university governance model, most notably between the Board of Governors and the Senate at York, it is one that emphasizes the independent self-governing nature of universities as institutions.

While universities might be independent, accredited degree-granting institutions must have their accreditation come from somewhere. These programs are also subject to evaluation, and that process is also one whereby the provincial government could potentially influence teaching practices at otherwise independent institutions.

In Ontario, the authority to grant degrees is limited by the *Post-secondary Education Choice and Excellence Act*.¹² This *Act* limits the ability to name something a “university” unless they have been authorized by the Minister or by an act of the Assembly to do so.¹³ It similarly limits the awarding of university or college degrees, providing the programs for them, advertise them, or sell a diploma to those authorized by the Minister or an act of the Assembly.¹⁴ The *Act* also sets up a quality assurance review process and organization to advise the minister in issuing authorization.¹⁵ The associated regulations set out a variety of standards and procedures, many aimed toward the regulation of private colleges.¹⁶ It should be noted that universities are, as discussed earlier, established by an act of the Assembly, so they are not bound by the quality assurance process set up in this *Act*, which is mostly designed to regulate private degree-granting institutions and the college system.

There have been, however, been legislative impositions upon internal university practice. For example, the Ministry of Training, Colleges and Universities Act provides, under s. 17, a requirement that every publicly funded college establish a sexual violence policy and describes the process for developing it and requires, in ss. 7 that relevant information be provided annually to the Minister.¹⁷

Quality assurance as well as program approvals at the university level are done by the Ontario Universities Council on Quality Assurance, an independent body constituted by the universities themselves.¹⁸ While the Council consults with the Minister,¹⁹ it remains a separate entity and not responsible to him or her. This means that quality assurance, like university governance, rests in the hands of the institutions. The tradition in Ontario has been that universities, unlike colleges and other educational institutions, will remain

¹¹ Friedland, Martin L. *The University of Toronto: A History*. Toronto: University of Toronto Press, 2nd ed. 2013 at 99-111

¹² 2000, S.O. 2000, c. 36

¹³ *Ibid* s. 3

¹⁴ *Ibid* s. 2(1)

¹⁵ *Ibid* s. 7

¹⁶ O. Reg. 279/02

¹⁷ R.S.O. 1990, c. M.19

¹⁸ <http://oucqa.ca>, <http://oucqa.ca/wp-content/uploads/2019/03/Quality-Assurance-Framework-and-Guide-Updated-Guide-March-2019.pdf> both retrieved 8 May 2019

¹⁹ <http://oucqa.ca/resources-publications/quality-assurance-framework/> 8 May 2019

largely free of direct governmental control and for all practical purposes the standards documents produced by the Council do have the force of law for universities in the province. While not backed by statute, the universities as a whole have created a structure that serves the same purpose, essentially acting in a manner analogous to a professional body.

There is no legal impediment preventing a provincial government from legislating in this area, perhaps by modifying the constitutive statutes for the universities themselves or by some other means such as was done in requiring a sexual assault policy. However, it would seem that the consensus in Ontario across multiple governments has been to maintain the autonomy of universities. It should be noted that the Ford government has already demonstrated its willingness to run roughshod over this kind of long-term consensus, for example in its decision to reduce Toronto City Council's size without consultation,²⁰ so this should not be seen as entirely outside the realm of possibility. That said, the Ford government has already indicated its willingness to interfere with the status quo for universities in Ontario in two different ways. First, by the introduction of a policy ostensibly designed to protect free speech on university campuses and, second, by proposing tying funding directly to some form of student outcome metric.

In the case of the free speech policy,²¹ the Ford government has followed the model of s. 17 of the Ministry act. This does not, at first blush, seem problematic, but it could be argued that the goals of the new requirements cut to the root of what a university does, while s. 17 is about student safety, something less related to the mission of universities.

Attempts to tie university funding to some sort of 'quality' metric designed outside the existing quality review process are more problematic because they upset the decades-old convention that it is universities themselves that should police content and delivery method. Moreover, the specific kinds of metrics described by the government in its budget²² seem to push towards an employment-education model of the university, one that is at odds with the ideals described by, for example, s. 4 of the *York Act*.²³

This summary has not addressed labour law on campus. This carries with it other risks, but not perhaps inherently different from others in the public sector. It should be noted, however, that there can be unexpected consequences to meddling in faculty/university negotiations. In 2016 the Government of Manitoba attempted to limit wage increases at the University of Manitoba by directing a one-year wage freeze, which at that time was in negotiations with its faculty union. Negotiations broke down and there was a strike. The union filed an application to the Manitoba Labour Board alleging a failure by the University to bargain in good faith, due to the failure to disclose this directive from the

²⁰ *Better Local Government Act, 2018*, S.O. 2018, c. 11

²¹ <https://news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html> retrieved 21 May 2019

²² <http://budget.ontario.ca/2019/chapter-1d.html#section-4> retrieved 21 May 2019

²³ *Supra* note 4 s. 4

Government. The Labour Board found that the University's conduct constituted an unfair labour practice.²⁴

This seems unlikely to happen on Ontario, since the institutional independence of the universities prevents the government from negotiating with the faculty unions directly, something pointed out by the Ontario Confederation of University Faculty Associations.²⁵ Recent attempts to prevent faculty from 'double-dipping,' that is drawing their pensions while remaining active on campus, raise similar concerns and would undoubtedly receive court challenge.²⁶

The institutional structure of Ontario Universities makes them resistant but not impermeable to command-and-control efforts by the Ontario government. However it is more likely that adjustments to the funding model will put pressure on institutions like York that derived most of their income from domestic undergraduate teaching. Changes to this model, particularly those that are masked using accountability language could be used to limit university independence even in areas directly related to the kind of academic independence recognized by the Supreme Court. Pushed sufficiently, this kind of pressure could be used to make universities conform to a neo-liberal model of education where academic decisions are driven by economic interests. These sorts of goals would be quite different than the institutional goals described in s. 4 of the *York Act* described previously and would represent, we suggest, a fundamental change in the nature of university education in Ontario.

²⁴ *University of Manitoba Faculty Association and University of Manitoba*, 2018 CanLII 5426 (MB LB)

²⁵ <https://ocufa.on.ca/blog-posts/ocufa-opening-statement-for-the-ontario-public-sector-consultations-on-collective-bargaining/> retrieved 14 May 2019

²⁶ <https://www.theglobeandmail.com/canada/article-new-proposal-from-doug-ford-government-would-force-senior-professors/> retrieved 14 May 2019