

# Public Universities and the Public Interest: Toward a Vision of Governmental Oversight

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## Introduction

What does autonomy mean in the context of a public university? From whom is the university autonomous? Typically, this autonomy is defined in relation to government intervention in academic programs and in the past was associated with preserving academic freedom.<sup>2</sup> More recently, questions of autonomy have extended to a range of government-sponsored regulatory instruments.<sup>3</sup> From this autonomy vantage, government interference with universities may be seen as motivated by short-term horizons and partisan inclinations or demonstrate insensitivity to the unique context of universities. What makes a “public university” public? It is not simply that public funds are disbursed to these institutions or that they are established by statute, but rather that public universities exist in order to advance the public interest. It falls to government to preserve and promote the public interest. The rationales for government involvement in postsecondary education are well accepted and flow from the government’s guardianship over public interest values (citizenship and civic virtues, pursuit of knowledge, accessibility of social mobility, etc).<sup>4</sup> From this accountability vantage, universities may appear disconnected from these public interest goals unless close governmental

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<sup>2</sup> Some scholars have asserted that university autonomy may not always have been so instrumentally conceived. Glenny and Dalglish, for example, argued “The conception of the autonomous university really anteceded any perception of the function or utility of that kind of independence. Autonomy was not then seen as a means of insulating the university from outside interference or meddling; it was simply a social fact, a state of being, a given on the basis of which the organizational structure and traditions of the university developed.” See Lyman A. Glenny and Thomas K. Dalglish, *Public Universities, State Agencies and the Law: Constitutional Autonomy in Decline* (Berkeley: Centre for Research and Development in Higher Education, University of California, 1973), p.9.

<sup>3</sup> For discussion, see Terrence J. MacTaggart et al., *Seeking Excellence Through Independence: Liberating Colleges and Universities from Excessive Regulation* (San Francisco: Josey-Bass, 1998).

<sup>4</sup> In this volume of papers, see Ronald J. Daniels and Michael J. Trebilcock, “Towards a New Compact in University Education in Ontario”, pp. 3-9. In broad terms, the authors identify three rationales for government intervention in postsecondary education: positive externalities (i.e. civic virtues and citizenship values), paternalism (i.e. students may not be sufficiently informed to make rational choices) and equality of opportunity goals.

supervision is maintained. While both government and universities are dedicated to promoting the public interest in postsecondary education, their differing vantage on the issues cannot easily be reconciled.

What distinguishes public universities from private universities is also what complicates the tensions around autonomy and accountability with government – if the defining quality of a public university is its advancement of the public interest, and both those universities and the government of the day owe an obligation to act in the public interest, how are differences of opinion over the interpretation of the public interest to be resolved? These differences of opinion may arise internal to government (e.g. between the Minister responsible for universities and the rest of Cabinet, between political staff and civil servants, etc) internal to universities (e.g. between faculty, staff, students and the administration, among faculties, units and divisions, etc) or between government and universities. The public interest, in this sense, is not a definable set of static directives, but rather a framework within which internal and external dialogues about the appropriate and desirable aspirations for the university may take place. To say that public universities exist to advance the public interest is also to make a participatory claim on whose voices will be considered legitimate in such a dialogue and a stakeholder claim on whose vested interests must be considered.

In this brief paper, I examine the relationship between governments and public universities from a public interest perspective. My focus is not on the rationale for government involvement nor on the desirability of various regulatory instruments, both of which are canvassed elsewhere in this conference, but rather on the balance between autonomy and accountability. I conclude that the public interest would not be served either by direct government intervention in university affairs nor by completely devolved authority over university affairs to the universities themselves. The proper balance between autonomy and accountability must address the interests of both universities and governments but should not be unilaterally determined by either. I argue there is a compelling case in this setting for a buffer agency both to help find and implement the

proper balance – this requires an arm’s length body which has a legitimate public interest mandate, and which is controlled neither by the government nor by the universities.

This paper will be divided into four sections. In the first section I consider the possibilities and limits of direct governmental oversight over universities. In the second section, I explore the more decentralized approach of relying on internal university governance for oversight. In the third section, I examine the potential of a buffer agency which would serve as an intermediary between governments and universities. Finally, in the fourth section, I sketch an approach to the interdependence of and interaction between these three forms of oversight. Most of the examples cited in this paper are drawn from Ontario. This is both the jurisdiction with which I am most familiar and a jurisdiction now receiving significant attention in light of the Postsecondary Review. I believe most if not all the dilemmas explored, however, apply more broadly in Canada. Indeed, the overarching tension between autonomy from and accountability to government represents a universal characteristic of public universities in all welfare states. That said, a comparative analysis among provinces or other welfare states lies beyond the scope of this study.<sup>5</sup>

### **1) The Possibilities and Limits of Governmental Control**

The relationship between government and universities has always been complex. Indeed, from a legal standpoint, the defining characteristic of universities is their autonomy from government control. This issue reached the Supreme Court of Canada in *McKinney v. University of Guelph* when it considered a challenge by university faculty and librarians to mandatory retirement under the *Charter of Rights and Freedoms*.<sup>6</sup> The *Charter’s* applicability is limited to “government action”. In concluding as a preliminary matter that the affairs of universities would not be subject to scrutiny as government action within the meaning of the *Charter*, Justice La Forest observed that,

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<sup>5</sup> For a review of provincial initiatives, see Peter J. George and James A. McAllister, “The Expanding Role of the State in Canadian Universities: Can University Autonomy and Accountability be Reconciled?” Council of Ontario Universities, Discussion Series, Issue No. 3. 1994. For an insightful look at the Australian approach to the autonomy/accountability tension in the setting of public universities, see Martin Hayden and Lynn Meek’s contribution to this volume: “The Governance of Public Universities in Australia: Trends and Contemporary Issues”.

<sup>6</sup> [1990] 3 S.C.R. 229.

It is evident from what has been recounted that the universities' fate is largely in the hands of government and that the universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds. It by no means follows, however, that the universities are organs of government.<sup>7</sup>

La Forest J. added, “Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment.”<sup>8</sup> While this may be true, the line between government influence over operations and government control over policy is not always easy to draw.

Canada has a long history of governmental involvement in public universities. As Craig Riddell observed, “All Canadian jurisdictions are characterized by extensive government involvement in the provision and financing of post-secondary education”<sup>9</sup> As David Laidler emphasized, “the resources needed to create, maintain, and expand Canadian universities have, from the outset, come predominantly from government....In Canada, when governments feel short of funds...and cut back on university spending, the reduction impinges on the whole sector, not just one segment of it.”<sup>10</sup> Provincial governments, of course, were once far more involved in university affairs. For example, Martin Friedland’s *The University of Toronto: A History* details the proactive role of Premiers of Ontario and Cabinet in deciding on the hiring of faculty well into the nineteenth century.<sup>11</sup> In fact, legislation creating greater self-government for the University of Toronto through a governing board in the nineteenth century was sparked not by the recognition that government should have an arm’s length relationship with universities, but rather by the recognition that self-government would preserve

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<sup>7</sup> Ibid. at 272.

<sup>8</sup> Ibid at 274.

<sup>9</sup> W. Craig Riddell, “The Role of Government in Post-Secondary Education in Ontario” Paper prepared for the Panel on the Role of Government, October 2003, <http://www.law-lib.utoronto.ca/investing/reports/rp29.pdf> , p.7

<sup>10</sup> David Laidler, ed. *Renovating the Ivory Tower : Canadian Universities and the Knowledge Economy*. Toronto: C.D. Howe Institute, 2002, p.5.

<sup>11</sup> M. Friedland, *The University of Toronto: A History* (Toronto: University of Toronto, 2002), at [insert]. See also David M. Cameron, *More than an Academic Question: Universities, Government and Public Policy in Canada* (Halifax: Institute for Research on Public Policy, 1991), p.26.

governmental influence at the expense of religious denominational institutions which then controlled many universities.<sup>12</sup>

The tradition of government supervision of public universities is reflected in the fact that public universities in Canada, were with some notable exceptions statutory creations. The University of Toronto was established by the Ontario legislature in 1859. Other universities were created out of specialized educational bodies under the direct control of the province, such as the University of Guelph. Provincial statutes set out the universities' powers, functions, privileges and governing structure. While these statutes affirm reflect governmental stewardship over university affairs, they also, by their terms, recognize that each university is an autonomous institution, where most significant authority over academic development is vested in a governing board or senate. Some empowering statutes also provide for specific objectives for universities,<sup>13</sup> but most provide for what I would term a general public interest authority relating to the advancement of learning and dissemination of knowledge for the betterment of society. To give one example, the *York University Act*, provides that its objects 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.<sup>14</sup>

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<sup>12</sup> Ibid. at pp.64-73.

<sup>13</sup> Those terms may also reflect clear policy goals. For example, the *University of Ontario Institute of Technology Act, 2002*, S.O. 2002, c.8, provides that the object of the University is: The objects of the university are,

- (a) to provide undergraduate and postgraduate university programs with a primary focus on those programs that are innovative and responsive to the individual needs of students and to the market-driven needs of employers;
- (b) to advance the highest quality of learning, teaching, research and professional practice;
- (c) to contribute to the advancement of Ontario in the Canadian and global contexts with particular focus on the Durham region and Northumberland County; and
- (d) to facilitate student transition between college-level programs and university-level programs.

<sup>14</sup> *York University Act*, 13-14 ELIZABETH II, 1965, s.4.

While these Acts affirm the university's mission and establish a structure of internal governance and authority, they are silent on the relationship between those universities with government. Because Canadian jurisdiction rejected the American model of a single centralized and unified system of universities (e.g. The University of California has campuses throughout the state) one must speak not of a single relationship between the government and the public university system but of multiple relationships between the government and individual institutions (this would include 18 universities in Ontario). The inefficient and unwieldy prospect of managing multiple institutional relationships lends to the logic and efficiency of a mediating buffer agency discussed below.

While the motivations for particular government programs and initiatives may vary, traditionally, direct government involvement in University life has come in three related forms: 1) funding schemes; 2) regulatory requirements; and 3) policy initiatives.<sup>15</sup> I will briefly touch on each in turn.

**a) Funding**

The methods, timing and adequacy of government funding of public universities has been extensively explored by others. Increasingly, funding has been tied to targeted government priorities. This may be done in several ways. A portion of the funding may be set aside to disburse according to results of performance indicators (Ontario's Key Performance Indicators is one example, though it accounts for less than 1% of the operating grants provided to universities from the Ontario government. Or, new funding could be made available targeted to specific programs or initiatives. Another form of tying funding to government priorities is to cap expenditures on specific programs. Such a cap in Ontario has applied to new graduate programs. Funding implement policy preferences in a global sense as well. As the Ontario government has reduced its funding

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<sup>15</sup> I am here focusing on provincial government involvement in universities. The federal government also plays a significant role as a funder of universities but this is almost entirely indirect. The federal government subsidizes tuition through its millennial scholarships and other financial aid, and subsidizes university operating grants through transfers of cash and tax points to the provinces. The federal government, as a practical matter, does not retain control over how these funds are disbursed by the provinces. Finally, through SSHRC, the federal government subsidizes a vast array of research through direct funding of academics. The recent Canada Research Chairs program, administered through SSHRC, is likely the most direct influence the federal government has had over the academic priorities and performance of universities.

relative to university expenditures, this has compelled universities to seek funding from other sources, principally through tuition revenues (separately regulated by the province) and charitable donations.

The government has also tied its funding for postsecondary education to an accountability framework which is intended to promote the achievement of the following objectives: 1) program quality, 2) access, 3) responsiveness to changing educational needs, 4) cost-effectiveness in the delivery of programs and services and sound financial management.<sup>16</sup>

#### **b) Regulatory Requirements**

Universities are enmeshed in a variety of regulatory relationships with government. In addition to operating grants to universities and special program funding, both of which come with regulatory requirements (including issuing audited financial statements, etc), government sets the parameters within which universities may set tuition levels. Government also regulates various aspects of facilities and physical plant development. Government oversees a range of programs designed to benefit students, including funding for accessibility to disabled students, and student loans and grants, among others. Universities, of course, must also comply with a host of other governmental rules, ranging from labour relations to environmental regulations, from compliance with the *Human Rights Code* to compliance with municipal building codes.

Another important regulatory dimension to the government-university relationship relates to the process by which the Ministry of Training, Colleges and Universities approves academic programs for funding. The Ministry does not impose qualitative standards for approving new programs but does ensure the institutions seeking approval meet the institutions own quality standards and the these standards are objectively set. Additional criteria for Ministry approval relate to the institution's ability to manage and finance the program and prior approval of the program (if a graduate program) by the Ontario

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<sup>16</sup> This accountability framework is discussed in the Ontario Provincial Auditor's Report in 2001 – see 4.13 “Accountability Framework for University Funding” at <http://www.auditor.on.ca/english/reports/en01/413e01.pdf> at pp.335-7.

Council for Graduate Studies (OCGS), part of the Council of Ontario Universities (COU) discussed below. While some provincial governments review the academic quality of a program directly (e.g. B.C. and Alberta), in Ontario, it is the eligibility of a program for public funding that is subject to government approval, not the authority of a university to offer the program.

These regulatory relationships give rise to a dense and often onerous reporting requirements imposed on universities. Reporting requirements between Ontario universities and the Ontario government include: reporting on enrolment target agreements, audited financial statements, capital plan investment reports, facility renewal program reports, Ontario Student Opportunity Trust status reports, Access To Opportunity Program reports, Ontario Graduate Scholarship in Science and Technology reports, bilingualism grants reports, tuition fee set aside reports, tuition fee monitoring reports, accessibility funding for students with disabilities reports, quality assurance fund reports, audited OSAP compliance reports, reports on special purpose grants, graduate surveys, new program approval submissions and the list goes on.<sup>17</sup> These reporting requirements are, of course, over and above the extensive reporting requirements of governing boards to the university community itself.

The regulatory relationship between governments and universities is inextricably bound up in their funding relationship, but extends beyond it as well. Notwithstanding the complexity of this relationship, accountability generally continues to be understood in a linear and one-dimensional fashion – primarily as rules established by government as a condition of providing universities with funding, or as a condition of their authority to operate and grant degrees, to which recipient institutions must demonstrate compliance through reporting and audits.<sup>18</sup> This formalistic approach to regulatory compliance tends to overemphasize those aspects of university life which can be quantified and verified (e.g. enrolments, graduation rates, budgets) while underemphasizing more subjective

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<sup>17</sup> This list is drawn from Appendix A to Council of Ontario Universities, *Proposed University Accountability Framework* (November 15, 2004).

<sup>18</sup> For a discussion and critique of this approach to accountability, see Rod Dobell, “The Role of Government and the Government’s Role in Evaluating Government: Insider Information and Outsider Beliefs” Paper for the Panel on the Role of Government (August 2003), p.53.

aspects of university affairs which resist quantification (e.g. teaching excellence, acquiring critical thinking and analytic skills, excellence in research, enriching civic values and promoting a learning society, etc).

### c) **Policy Development**

Government involvement in universities relates not only to funding and regulatory requirements but also to substantive policy aspirations. Governments see themselves not simply as funding universities but as investing in particular policy outcomes. Typically, these outcome related interests hark back to the rationales for government intervention in postsecondary education discussed at the outset of this paper – economic benefits and skills training, benefits of social mobility, benefits of civic engagement, and benefits of accessibility. Here, government policy mingles with the qualitative standards set by universities themselves. For example, by targeting funding to growing computer science programs through its Access to Opportunities Program (ATOP) initiative, the Ontario government was able to demonstrate a policy initiative to capture public interest in the “new economy,” rise to a challenge from industry to “double the pipeline” of IT professionals, and encourage university responsiveness to market demands.<sup>19</sup>

Concerns over government interference in the day-to-day operations of Canadian universities have become an increasingly familiar refrain in the university setting.<sup>20</sup> Part of this trend is driven by politics and the desire to reap political capital from the success of universities. Part of this trend is driven by fiscal pressures on government and the

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<sup>19</sup> The Ontario government introduced ATOP in 1998 and committed \$150 million to the creation of 17,000 new spaces for computer science and engineering. Funding was subsequently increased and the target number of spaces expanded. Universities, in order to access ATOP funding, had to match the amount of money of their request. An advisory board for ATOP was established with John Roth, then CEO of Nortel, as its Chair. The ATOP example is a cautionary tale. Many universities participated and thousands of new spaces in computer science departments and engineering faculties were created and faculty hired. With the downturn in the high tech sector beginning in 2000-2001, however, a sharp downturn in computer science enrollments occurred. For discussion, see Heather –Jane Robertson, David McGrane and Erika Shaker, *For Cash and Future Considerations: Ontario Universities and Public-Private Partnerships* Canadian Centre for Policy Alternatives (September 2003) <http://www.policyalternatives.ca/publications/>

<sup>20</sup> See Riddell, supra note 9. This observation is neither new nor novel – it was also of concern a decade ago. See George and McAllister, supra note 5. See also Peter C. Emberley, *Zero Tolerance: Hot Button Politics in Canada's Universities* (Toronto: Penguin, 1996), pp. 1-20.

desire to decrease operating grants or increase the value of existing operation grant moneys. Part of this trend is driven by reports from provincial auditors and others critical of the accountability of universities. Part of this trend is driven by broader public sector trends, whether “new public management” strategies or neoliberal restructuring.

Should government develop its own on minimum standards of quality or aspirations to excellence in postsecondary education? Is government well-placed to articulate such standards? Even if developed, can such standards be imposed on universities without compromising their autonomy? These questions are beyond the scope of this paper and dovetail with the discussion of performance indicators to be taken up in a separate paper.<sup>21</sup> Here again, however, the advantages of a buffer agency appear clear. Such an agency would be ideally placed to develop standards for the postsecondary system but in a fashion sensitive to various institutional cultures and the distinctive challenges of the university context.

To conclude, government involvement in university affairs through funding, regulation and the pursuit of policy is both broad and deep. The breadth and depth of this involvement, however, necessarily impairs the autonomy of public universities to identify and pursue their own priorities in the public interest.

## **2) The Possibilities and Limits of University Governance**

The 1993 Ontario Task Force Report, *University Accountability: A Strengthened Framework*, recognized that Universities’ own governance structures should represent the “primary and most effective locus of institutional accountability” for Universities, and which would be able to address “the legitimate interest of the government in holding the institution responsible for its use of public funds.”<sup>22</sup>

Most Universities have a bicameral structure of internal governance, dividing up

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<sup>21</sup> See contribution to this volume by Andrew Green and Edward Iacobucci.

<sup>22</sup> *University Accountability: A Strengthened Framework*, supra note 17 at p. 35.

responsibilities over governance and management to a Board,<sup>23</sup> and decisions over academic programs and related matters to a Senate.<sup>24</sup> Through governance institutions such as a university's Board, various constituencies in the university community find representation, including faculty, staff, students and alumni. The Senate typically serves as a representative body for a university's diverse faculties, departments and units. Thus these bodies serve at once to advance the public interest mandate of Universities, to demonstrate accountability to the university community and to reflect, through the range of reporting requirements discussed above, accountability to the government.

University policies and practices to provide oversight over the affairs of its units, divisions and faculties are sophisticated and extensive and beyond the scope of a study. However, because universities do have extensive internal accountability measures, they may be justifiably skeptical of the need for extensive external accountability measures (beyond external oversight over the proper functioning of those internal accountability measures). The Council of Ontario Universities submission to the Postsecondary Review captures this tension in its articulation of how universities should demonstrate accountability to government:

Universities acknowledge the need to demonstrate accountability for the public funding they receive, and to demonstrate accountability to all their various stakeholders and funders, but assert that an accountability framework for universities must reflect their status as autonomous institutions, the overall diversity of the system and the evolving differentiation of universities as they develop strong missions and mandates appropriate to their particular size, location and role in Ontario. Universities should be judged against these particular missions and the strategic plans put in place to ensure that each university contributes to Ontario's economic and social

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<sup>23</sup> Including the appointment of a President, appointing, promoting and terminating teaching staff and university officers, granting and terminating tenure, fixing duties and salaries of officers and employees, planning and implementing the physical development of the university, establishing and collecting tuition fees, regulating conduct of university community members, establishing rules and regulations over university affairs, including making by-laws and compliance with governmental legislation and regulations. For discussion of these roles and responsibilities, see *Proposed University Accountability Framework*, supra note 17, at pp.5-6

<sup>24</sup> Including the establishment and modification of curricula and programs, determining standards of admission, governing exam-writing and grading, hearing and determining appeals from decisions of faculty, granting degrees and other awards, and coordinating long-range academic planning. See *ibid.* at p.7.

development.<sup>25</sup>

Furthermore, apart from its role in external accountability, the government also exercises significant influence over internal accountability in public universities. The government is involved in this internal governance framework in several ways. First, the establishment of these governance structures, their composition and authority, all derive from statutory sources over which the government retains supervisory jurisdiction. Second, provincial governments have established additional standards to which internal governance structures must comply (e.g. requiring conflict of interest guidelines). Finally, provincial governments themselves typically appoint a proportion of board members. In the University of Toronto, for example, which has a unicameral system of governance consisting of an elected 50 member body known as Governing Council, the composition is designated as follows:

Twenty-five members of the Governing Council are from within the University: 12 teaching staff, 8 students, 2 administrative staff, the President and 2 senior officers appointed by the President. The other 25 members consist of 16 appointees of the provincial government, 8 elected alumni and the chancellor, who is also elected by the alumni. The Governing Council annually elects a Chair and Vice-Chair from among the members appointed by the province.

The accountability of such governing bodies is often complex. They must represent and enjoy the confidence of the university community (faculty, staff, students and alumni), reflect the diversity of the university's mandate, and a relationship with the city, town or region where the university is situated. Because of their differing structures and disparate operating environments, it is difficult to aggregate the sum of these internal structures. Thus, while the importance of external accountability to the government from particular universities may be debatable, the importance of government's own accountability for the postsecondary sector as a whole is clear, and requires aggregate measures on all universities.

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<sup>25</sup> Ibid at p.2.

### 3) The Need for a Buffer Organization

While direct governmental involvement and decentralized university authority each fulfills a part of a public interest mandate, I conclude that neither governments nor universities may advance the public interest in postsecondary education alone. It is as a complement to the public interest mandate of governing bodies of universities and as an extension of the public interest mandate of government over the postsecondary system of education that the need for and value of a buffer agency is most apparent.<sup>26</sup> Buffers can shield government from the distorting effects of being required to intervene directly in disparate institutions while at the same time shielding universities from governmental meddling.<sup>27</sup>

There are many examples of buffer agencies in the University sector in North America, Europe, Australia and beyond. Too often, the desire to create a buffering entity between a public organization and government simply establishes a different and cumbersome bureaucracy to navigate. Worse, as the example of the United Kingdom's "Quality Assurance Agency" suggests, buffer agencies with a mandate to evaluate academic performance to which funding is tied can trigger perverse incentives.<sup>28</sup>

Ontario's prior experience with buffer agencies represents in my view a cautionary tale.<sup>29</sup> Following the recommendation of a 1972 Commission on Postsecondary Education in Ontario, the government established the Ontario Council on Universities Affairs

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<sup>26</sup> In Ontario, calls for such a "buffer" approach date back at least to the 1950s. In 1958, the Advisory Committee on University Affairs in Ontario was one of the first attempts at a mediating body to assess university needs. The 1972 Report of the Commission on Post-Secondary Education in Ontario entitled *The Learning Society* was one of several to recommend this approach (at p.108). For discussion, see Ontario Confederation of University Faculty Associations, *Overdue for Renewal: Pulling Ontario's Universities Together by Bringing an Improved Council on University Affairs Back to Life* (September 2004) Research Report Series, Vol. 5. No. 5.

<sup>27</sup> I am grateful to Harry Arthurs for this observation.

<sup>28</sup> These are alluded to in Daniels and Trebilcock, *supra* note 4, at p.28.

<sup>29</sup> For a general review of the Ontario experience, see Paul Axelrod, *Scholars and Dollars: Politics, Economics and the Universities of Ontario, 1945-1980* (Toronto: University of Toronto Press, 1982).

(OCUA). While there was consideration given to investing this buffer agency with authority over admission standards and the authority to establish or terminate programs, in the end it was created as an advisory body.

In 1996, the Ontario government disbanded OCUA along with a host of other advisory bodies (including the Ontario Law Reform Commission), ostensibly as a cost-saving measure.<sup>30</sup> At the time of its demise, OCUA had an annual budget of \$800,000, seven in-house staff and a council of 20 - members of the public, students, representatives from government, faculties and administrations - the council met monthly, and wrote advisory memoranda that were subsequently released publicly. According to Stefan Dupré, who happened to serve both as the first chair of OCUA in 1974 and was interim chair in 1996 when it was shut down, 85% of the council's recommendations had been accepted by successive provincial governments. When asked about the decision to scrap OCUA, Dupré observed, "As a former professor of public administration, I know that all government bodies are necessarily transient."<sup>31</sup> This, in the end, is perhaps the most salient point. Even if a buffer agency enjoys success, its continued existence depends on governmental support. Unless a buffer agency has formal or informal means at its disposal to resist government pressure, then it is unlikely to serve its purpose effectively.

Another model of buffer agency is one made up not of government and community appointees, but of appointees from the public universities themselves. The Council of Ontario Universities (COU) is an example of this form of stakeholder led buffer agency.<sup>32</sup> Originally known as the Committee of Presidents of the Universities of Ontario (CPUO), the organization was formed in 1962 in response to a need for institutional participation in educational reform and expansion. The committee was later enlarged to include two representatives from each member and associate institution: the executive head (university president, principal or rector) and an academic colleague appointed by each

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<sup>30</sup> Lynda Hurst, "Clear-cut mandate A zealous Tory MPP has no qualms about felling active agencies along with deadwood" *Toronto Star* (15 July 1996), C1.

<sup>31</sup> Quoted in *ibid.*

<sup>32</sup> The following description of the COU is drawn from its website: <http://www.cou.on.ca/bin/home/aboutCouncil.cfm> and its submission *Proposed University Accountability Framework* *supra* note 17.

university's senior academic governing body. In 1971, the committee changed its name to the Council of Ontario Universities. COU describes its activities as ranging from “issues management to information management” and from “leadership on collective issues to general operational support for our member institutions, committees and affiliates.” COU views itself as a venue both for addressing public policy expectations of greater accountability while supporting institutions' traditional rights of autonomy and self-regulation.<sup>33</sup>

The COU also engages in a variety of regulatory activities as well, which include quality assessments of academic programs. For example, the Ontario Council Graduate Studies unit appraises every graduate program offered in Ontario on 7 year cycles and all publicly assisted Universities in Ontario are bound not to implement or offer graduate programs which are not approved. The appraisal includes element of self study requirements, elements of peer review and elements of external judgment.<sup>34</sup> In describing the motivation behind quality assurance programs, David Leyton-Brown observes,

Quality assurance measures of various kinds have arisen for two principal reasons. Universities for many years have been concerned to ensure and enhance the quality of their educational programs... After all, even the best of programs can be made even better, and continuous quality improvement is a distinguishing feature the most renowned programs and institutions in the higher education community. However, that purpose is often in tension with the other driving force behind the recent increase in quality assurance processes in many jurisdictions – namely the increasing government pressure for public accountability. Governments in many countries are pressing for demonstration that their funding for higher education is well spent, that desired outcomes are achieved, and that

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<sup>33</sup> The COU's mission statement provides: “The Council of Ontario Universities (COU) represents the collective interests of 18 member institutions and two associate members. Its mandate is to provide leadership on issues facing the publicly funded universities, to participate actively in the development of relevant public policy, to communicate the contribution of higher education in the Province of Ontario, and to foster co-operation and understanding among the universities, related interest groups, the provincial government and the general public.” See [www.cou.on.ca](http://www.cou.on.ca)

<sup>34</sup> D. Leyton-Brown, “Demystifying Quality Assurance”, paper prepared for the Conference on Higher Education in Canada, John Deutch Institute, Queen's University, Kingston, Ontario, February 13-14, 2004, at 10-12. Undergraduate program reviews in Ontario are undertaken by way of auditing a university's own policies and practices for quality assurance of undergraduate programs. This oversight function is performed by the Ontario Council of Academic Vice-Presidents (OCAV) which in turn delegates this role to the Undergraduate Program Review Audit Committee (UPRAC).

quality is assured. Accountability purposes can lead to celebration or defence of the status quo, rather than the active search for change and improvement.<sup>35</sup>

With the Postsecondary Review, fresh calls for a revamped buffer agency structure have been issued, notably by the Ontario Confederation of University Faculty Associations (OCUFA), which supports a return to the OCUA model. OCUFA's report contends,

Such a council could achieve greater accountability of the university system to the public. It would build a solid base of research for debate and decision-making, expanding higher education information-gathering activities currently undertaken by the Ontario government and the Council of Ontario Universities, while giving faculty, staff, students, administrators and the broader community a forum to participate in the shaping of the future of institutions of enormous importance to the province's future.<sup>36</sup>

Michael Doucet, the head of OCUFA, commented upon the release of the report that, "The university system is too important to the future of the province to be held hostage to too much political ideology."<sup>37</sup> How is "political ideology" to be distinguished, however, legitimate policy preferences of the government of the day? While it is unclear that a buffer organization would find such questions less daunting, such an organization would be best placed to address these questions.

Still another model of the buffer organization is the federal Social Sciences and Humanities Research Council. The Social Sciences and Humanities Research Council of Canada (SSHRC) is an arm's-length federal agency that promotes and supports university-based research and training in the social sciences and humanities. Created by an act of Parliament in 1977, SSHRC is governed by a 22-member Council that reports to Parliament through the Minister of Industry. SSHRC funding supports individual researchers as well as university based programs across the country. Its base budget for 2004-05 is \$230 million, as determined by Parliament. SSHRC reports to Parliament

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<sup>35</sup> Ibid. at p.3.

<sup>36</sup> Overdue for Renewal: Pulling Ontario's Universities Together by Bringing an Improved Council on University Affairs Back to Life (September 2004) Vol 5 No.5 at p.3-4.

<sup>37</sup> Colin Perkel, "Profs want advisory council; They say putting universities in hands of bureaucrats leaves them open to political interference" Hamilton Spectator (7 September 2004), A11.

annually on how it disburses its funds but has autonomous authority to set its priorities, policies and funding programs and to make granting decisions. One of SSHRC's most ambitious programs has been its Canada Research Chairs (CRC) Program which has a total budget of \$900 million over five years and aims to establish 2000 research chairs at universities in Canada. Eligibility for the program hinges on a university's success in securing SSHRC and other grant funding.

Finally, one may see the role of the Provincial Auditor as a further example of a buffer agency with an oversight mandate. In Ontario, the Provincial Auditor as a legislative office has significant independence from the government of the day. The Provincial Auditor also has expertise reviewing other areas characterized by autonomous bodies receiving government funding (for example, auditing public expenditures on courts. The oversight of the Provincial Auditor usually encompasses the financial and accounting practices of public institutions, but more recently has embraced more controversial "value for money" audits in a range of social policy spheres. These types of audits, while sometimes methodologically suspect, may constructively extend the reach of the Provincial Auditor to assessing the success of government performance indicators, tracking and results. The role of the Provincial Auditor, in other words, is not so much to serve as an intermediary between governments and universities but to act as an arm's length check on the objectives, policies and activities of each. This is a different but essential buffer role in the public universities' sector.

While buffer agencies may come in various forms (and may focus in varying combinations on the financial, academic or governance aspects of universities), the form used to create a buffer agency cannot guarantee its effectiveness. Without a new vision of the relationship between government and universities – or a new "compact" in the words of recent Panel on the Role of Government – oversight is likely to mean simply more paperwork. It is to sketching some principles which I believe ought to guide the new vision that I now turn.

#### **4) Toward a Shared Public Interest Mandate for Government and Universities**

In a post-Enron, post-sponsorship scandal era, one tends to equate oversight with independent auditing. Audits, to be sure, have a role to play, and in an era of value-for-money auditing, even that role is not without its agendas and controversy. I would like to focus, however, on relationships of oversight based on a shared public trust and multiple perspectives on how that public trust should best be discharged. Both the concept of a shared public trust and the concept of a pluralist approach to oversight warrant brief elaboration.

##### **1) public trust**

Both government and universities have duties to promote the public interest through the postsecondary education system – yet each has distinctly different perspectives and capacities to bring to bear on discharging this public trust obligation. The success of their relationship, I would suggest, depends not only on clear, mutual expectations regarding roles and responsibilities, but also on the principle of a shared public trust. This public trust, in turn, should be the foundation for the trust which governments and universities nurture in each other and the basis for the trust both nurture in the public through their collaboration. As Glenny and Dalglish observed, writing in the American context,

In the long run, however, institutional autonomy rests primarily on the amount of trust that exists between state government and institutions of higher education. That trust colors relationships between the two sectors so much that talk of the marginal effects of legal status pale into something close to insignificance by comparison.... There are too many ways that state government can assert controls over institutions of higher education, whatever their legal status, to permit confidence in an institution's ability to operate with complete or even marginal autonomy. The power of the University to protect itself, and the academic values it is assumed to have, from political and bureaucratic interference rests primarily on public trust and confidence.<sup>38</sup>

As school boards, police boards and public health authorities demonstrate, buffer organizations can constructively diffuse the partisan implications of operational decisions and provide better responsiveness to specific areas of significant stakeholder and public

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<sup>38</sup> Supra note 2, at p.152.

concern than could direct government decision-making.<sup>39</sup> In some ways, the challenge in the setting of public universities is that each university is so meaningfully distinct from the other – it is not only imperative for the government and the university community to establish relationships of mutual recognition and trust but also for universities to establish such relationships with each other. The recent past in Ontario has sometimes witnessed indications of the opposite trend, with groups of universities banding together for discrete purposes, including government lobbying, and leading to a divisive climate. A buffer agency would arguably diminish both the opportunity and the incentive for such divisiveness.

## **2) Pluralism**

Both autonomy and accountability, I would suggest, are advanced by a pluralist approach to oversight of the government-universities relationship. As discussed above, universities own structures of internal governance, government’s own ministerial policy-making and implementation of performance based funding, and the various approaches to buffer organizations, suggest there are multiple lenses through which to view the activities and achievements of universities, each of which is legitimate and valuable. There are distinct advantages to a pluralist approach to the oversight relationship, including a buffer organization, which include additional checks against error and bias, fuller information and deeper analysis, greater public awareness and transparency and finally, depoliticization.<sup>40</sup>

Beyond such advantages, pluralist approaches to oversight involving buffer organizations also raise additional concerns, which include:

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<sup>39</sup> This point is asserted and elaborated more fully in Colleen Flood and Duncan Sinclair, “Steering and Rowing in Health Care: The Devolution Option? Paper for the Role of Government Panel (September 2003), p.13.

<sup>40</sup> I discuss the advantages of pluralism in oversight in an analysis of the policing sector in Ontario in L. Sossin, “The Oversight of Executive Police Relations in Canada: The Constitution, the Courts, Administrative Processes and Democratic Governance” Commissioned by the Ipperwash Inquiry (June 2004).

- 1) Where is the first or ultimate point of contact for concerned members of the university community, or concerned members of the public to have input?
- 2) Where does the buck stop? Who has ultimate authority for the success of the public universities system?
- 3) How will a buffer organization ensure that multiple oversight does not mean multiple bureaucracy, regulatory reporting and compliance costs?
- 4) How will the proper legislative authority, capacity and budget for a buffer organization be assured?

If the benefits of the pluralism principle are to be reaped, these concerns must be addressed through the design and implementation of a buffer organization. Beyond emphasizing the need for any buffer organization to be sensitive to the concerns of all parties but lie at arm's length from each, it is beyond the scope of this paper to explore the particular aspects of a buffer organization which might best address these concerns. In Ontario, previous attempts at such a buffer organization (OCUA) and existing forms of analogous bodies (COU) would presumably represent the point of departure. The purpose of such an organization would be, at a minimum, to build on the capacities and perspectives both of government and universities, develop standards or benchmarks where desirable, identify best practices, provide oversight and serve as a venue for dialogue on public values in the university system.

## **Conclusion**

In this paper, I have emphasized the public interest and public trust dynamics of public universities as a framework within which to view the relationship between public universities and government. I briefly analyzed the possibilities and limits of governmental intervention in public universities and of universities' own governance mechanisms. I concluded with an exploration of and argument for a buffer organization. In closing, I believe that government and universities, because of the need to balance autonomy and accountability and the need for coherence in addressing the challenges and opportunities now facing postsecondary education, should look outside their own

horizons for new institutional forms capable of best advancing their shared commitment to the public interest.

# Public Universities and the Public Interest: Toward a Vision of Governmental Oversight



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# Outline

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- 1) A Public Interest Perspective:  
Between Autonomy and Accountability
- 2) Direct Government Involvement
- 3) University Governance
- 4) The Need for a Buffer Organization
- 5) Toward a Shared Public Interest  
Mandate

# 1) A Public Interest Perspective



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- Public Interest as Balance Between Autonomy and Accountability
- “Public Interest is not a definable set of static directives”
- Public Interest as Process
- Public Interest as Substantive Goals

# 2) Direct Government Involvement



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- 1) Universities are not “organs of government”
- 2) Forms of Direct Government Involvement
  - Statutes creating public universities
  - Funding schemes
  - Regulatory requirements
  - Policy initiatives
- 3) Limits on Government involvement from public interest perspective



## 3) University Governance

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- University governance structures (Senate, Board, etc) is “the primary and most effective locus on institutional accountability”
- Limits on University governance from a public interest perspective:
  - Problems of diversity
  - Problems of fragmentation



## 4) The Need for a Buffer Organization

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- OCUA: A Cautionary Tale?
- COU: Collective Autonomy/Self Regulation?
- A Role for the Provincial Auditor?
- How to Build a Better Buffer?
  - Arm's length
  - Sufficient resources, capacity, credibility
  - Authority/Advisory mandate



## 5) Toward a Shared Public Interest Mandate

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- Shared public trust (and political will)
- Multiple perspectives and pluralism in oversight
- Toward a vision of governmental oversight