

PRELIMINARY REVIEW OF BILL 46

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OVERVIEW

Bill 46, the *Public Sector Accountability Act, 2001* (the “Act”) had its first reading in the Ontario Legislature on May 9, 2001. The Bill as proposed requires “public service organizations” (PSOs) to take on significant obligations in addition to those already mandated by various statutes such as the *Corporations Act*. The Bill also appears to extend its application to entities which heretofore may not have been subject to ministerial review.

The purposes of the Act are said to be fivefold. In summary, the Act is intended to initiate best practices in PSOs and to improve their program effectiveness and accountability to the public, delivery of services, decision-making and fiscal responsibilities. (s.1) The foregoing is implemented by imposing planning and reporting requirements on each PSO. The Act further provides for monitoring the PSO’s compliance and for enforcement provisions should there be a failure in compliance. (ss. 4, 5 6-8, 9-10, 11-ff)

The scope of the new Act is demonstrated by the comments of the Minister of Finance delivered when presenting the 2001 Ontario Budget:

It [the Act] would require all major organizations that receive taxpayer dollars from our government to balance their budgets each year. That is accountability to the taxpayers who fund them.

But accountability does not end when the books are balanced. True accountability goes far beyond the numbers.

Public-sector organizations would have to issue plans to show what their objectives are and track their progress against these plans.

They would identify and demonstrate areas where they excel and cite areas where there is a need for improvement. They would report on their progress in finding new ways of delivering services. They would look for areas where the private sector could do a better job. And they would report on their efforts to find ongoing efficiencies.

We challenge them to show courage. To focus on services that are most valuable to the people of Ontario. To eliminate programs that are outdated and that no longer serve their original purpose. (2001 Ontario Budget, Budget Speech, Minister of Finance, The Honourable James Flaherty, dated May 9, 2001)

APPLICATION OF THE ACT

Section 2 of the Act identifies 10 categories of entity to be identified as “public service organizations” to which the Act applies. The PSOs include, *inter alia*, Crown agencies, municipalities, universities and colleges, hospitals, public school boards and boards of health.

In turn, the Act applies to every corporation without share capital “whose majority of members, directors or officers are members of, or are appointed or chosen by or under the authority of” one or more PSOs previously identified (s. 2, paras. 1-6), such as an organization comprised of public school boards. The Act also applies to any wholly-owned subsidiary of such a PSO.

Similarly, para. 7 of s. 2 stipulates that the Act applies to every corporation with share capital in which 90% or more of the issued shares are owned beneficially by any of the previously identified PSOs, (s. 2, paras. 1-6), as well as any of *that* corporation’s wholly-owned subsidiaries.

Paragraph 10 of s. 2 provides that other PSOs can also be prescribed. Despite the Minister’s explicit statement that the Act is intended to address “major organizations that receive taxpayer dollars”, an entity can be designated a PSO *even if it does not directly or indirectly receive provincial funding*. (s. 3(1)) In other words, the sky is the only limit so far as the application of this Act is concerned.

By the same token, PSOs identified in s. 2 of the Act can be “*de-prescribed*” by regulation so that, in effect, the PSO remains identified as such but the Act no longer applies to it. (s. 3(2)) Furthermore, the Minister may make regulations exempting PSOs from particular requirements of the Act or the regulations. (s. 19(b))

The Act does not apply to the Office of the Lieutenant Governor, the Assembly and the offices of persons appointed on the address of the Assembly. (s. 3(1))

WHAT HAPPENS IF YOUR ORGANIZATION IS A PSO?

(1) THE PLANNING PROCESS

Provided that a PSO has not be “*de-prescribed*” by regulation, the PSO is required to prepare a business plan every year, beginning with the PSO’s first fiscal year after March 31, 2001. (s. 4(1),(6))

Very specific information must be included in the business plan, in consultation with “the view of persons and entities outside the organization who may have an interest in its activities”. (s. 4(2),(3))

The PSO must explain its *raison d’être*, setting out its management structure, purposes and goals or objectives for the year, as well as any factors outside its control. (s. 4(2), paras. 1, 2, 4, 8) How the PSO expects to achieve the foregoing must be addressed by setting out its major activities

and actions for the year and a description of the resources upon which the PSO intends to rely. (s. 4(2), paras. 3, 5, 6) Moreover, the PSO must plan to monitor itself and plan to improve its services. (s. 4(2), paras. 7, 9, 10, 11). The governing body of the PSO must then approve the business plan. (s. 4(4))

Last, but not least, the PSO must plan a budget for the year. (s. 4(2), para. 12) Every PSO is now required to plan for a “balanced budget” which is specifically defined to mean “a budget in which the organization’s anticipated expenditures for a fiscal year do not exceed its anticipated revenues for the year.” The budget must be prepared in accordance with generally accepted accounting principles unless otherwise prescribed by regulation. (s. 5(1),(3); s. 13)

(2) REPORTING ON RESULTS

Every PSO must prepare an annual report within six months of the end of its fiscal year. (s. 6(1)) Once again, very specific information must be included, beginning with the business plan and financial statements for the fiscal year (also prepared in accordance with generally accepted accounting principles unless otherwise prescribed), as well as the PSO’s business plan for the following year. (s. 6(3), paras. 1, 7, 8; s. 13(2)) The PSO must then describe to what extent it has met its goals and objectives; if not, why not; and its plans to address the deficiencies. (s. 6(3), paras. 2-4) Two “statements” must also be included, indicating whether the PSO’s books and records are complete and accurate, and indicating whether the PSO’s “systems and practices” were up to the task of ensuring that the organization didn’t, in effect, squander its monies. (s. 6(3), paras. 5, 6)

The annual report must be audited by a licensed auditor and approved by the PSO’s governing body. (s. 6(4),(5))

Regardless of whether a PSO reported publicly in the past, its annual report will now be made available to all and sundry. It must provide a copy of the report to any person requesting it without charge, unless a regulation prescribes a fee. The annual report must also be submitted to the Ministry of Finance and to any other Ministry from which the organization directly or indirectly receives funding. (s. 7) Moreover, “any person” may publish information from the annual report and any Ministry may disclose same. (s. 8)

(3) MONITORING PERFORMANCE

The Minister of Finance (the “Minister”) may require the PSO to review its practices in accordance with specific requirements and restrictions, and to then report to the Minister (an “internal review”). On the other hand, the Minister may embark on his or her own review or delegate such a review to another person or entity (a “Ministerial review”). (s. 9(1),(2),(3),(5); s. 16)

Conditions precedent to the Minister ordering either type of review are that, in the Minister’s opinion:

- (1) the PSO has repeatedly failed to achieve the objectives in its business plan or fails to achieve one or more significant objectives for a particular year; and,
- (2) such a review “is in the public interest having regard to the purposes of this Act”. (s. 9(1), (2), (3))

Accordingly, once having decided the PSO is delinquent, the Minister must assess the “public interest” in the context of the purposes set out in section one of the Act. As is outlined above, the Act is intended to initiate “best practices” in PSOs and to improve their program effectiveness and accountability to the public, delivery of services, decision-making and fiscal responsibilities. (s. 1)

Such an assessment of the “public interest” is unconventional in that the “public interest” is circumscribed by the purposes of the Act. This disallows any countervailing concerns, such as whether such a review would interfere with the efficient delivery of services.

For either type of review, the Minister will notify any other Ministry providing funding to the PSO that a review is pending. (s. 9(6))

If the Minister decides to proceed with a Ministerial review, the PSO, its directors, members, employees and agents shall cooperate with the Minister or the Minister’s delegate, including giving him or her “full access to all information, documents, records and things in their possession or control” that the Minister wants to see. Furthermore, if any person withholds or conceals anything the Minister or the Minister’s delegate considers to be relevant to the review, the person withholding such information is guilty of an offence and, on conviction, is liable to a fine of not more than \$2000. (s. 9(7); s. 12)

On the other hand, generally speaking, no action or proceeding may be commenced against the Minister for anything the Minister or the Minister’s delegate does in pursuit of the review, so long as “good faith” prevails in the performance of the review. (s. 17)

This raises very serious issues concerning the Minister’s need to comply with some minimum process when conducting these reviews. It also raises issues of necessary safeguards to be

afforded to PSO personnel, who will be required to “co-operate” with the review. On the face of the legislation, there is no concomitant protection for PSO personnel who provide information to the Ministerial review in good faith.

The PSO is allowed, and is in fact required, to remove any references to individual names and other identifying information prior to disclosure of information. (s. 9(8)) However, the Minister may directly or indirectly collect and use personal information for the purposes of administering and enforcing the Act. Such information may be disclosed if necessary to those purposes. While there are restrictions upon the Minister’s discretion to disclose personal information that can identify an individual, none of these restrictions apply if such personal information relates to “employment matters”, even if there is a prior agreement that prohibits such disclosure (ss. 14, 15) Any items provided to the Minister are subject to the *Freedom of Information and Protection of Privacy Act* and thenceforth considered to be under the control of the Ministry of Finance for that purpose.

The Minister might pay for the review, but could also decide to lay part of or all of the costs at the feet of the PSO. (s. 9(7))

The review may result in the Minister making “recommendations” to the PSO or to another Minister with powers under any other Act relating to the PSO. Alternatively, the Minister may determine to exercise his or her powers under the Act. (s. 9(4))

In particular, if a PSO has a deficit, even though it ought to have a balanced budget, the PSO will be required to prepare business plans for the following two years prior to the beginning of the next year. Instead of a balanced budget, the PSO must plan for a surplus in the following year and may plan a surplus for the second year, such that in total the PSO has a surplus equal to the initial deficit. “Deficit” and “surplus” are specifically defined and accord with the definition of a “balanced budget”. (s. 10)

(4) ENFORCEMENT

Here is an example if a PSO fails to:

- (3) comply with the planning process generally;
- (4) balance the budget;
- (5) prepare the annual report;
- (6) co-operate with a Ministry review;
- (7) comply with the requirements imposed in relation to a deficit;
and/or,
- (8) comply with requirements of the Ministry in conducting a review.

The Minister may require a Ministry providing funding to the PSO to withhold all or part of monies, even if those monies are otherwise required to be paid by law. (s. 11(1), (2)) In this respect, the Minister of Finance can override any objections on the part of the other Ministry.

Any monies withheld can only be released to the PSO when the Minister is satisfied the PSO has complied with its obligations. However, if in the opinion of the Minister non-compliance continues past the following March 31, the monies will be contributed instead to the "Consolidated Revenue Fund". (s. 11(3), (4), (5))

The Minister's order to withhold monies from a PSO and the provisions regarding contribution of monies to the specified fund cannot be overridden by any other Act or regulation, unless the other Act specifically so provides. Under no circumstances can these provisions be overridden by agreement. (s. 18; Note, s. 18 also applies to s. 9(3), which addresses the Minister's ability to put restrictions and requirements on a PSO's internal review.)

More generally, there is no statutory avenue of appeal provided from any of the Minister's decisions or from the exercise of Ministerial powers pursuant to the Act. PSOs seeking relief will be forced to consider seeking an injunction preventing the Minister from proceeding or seeking judicial review of the Minister's decisions.