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CUPE Ontario
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Dear Sirs/Mesdames:

Re: Bill 55: The Government Services and Service Providers Act, 2012

Introduction

You have asked for assessment of Schedule 28 to Bill 55: the *Government Services and Service Providers Act*, 2012 (hereinafter the *Government Services Act*).

As the following note indicates, the *Government Services Act* would have far-reaching and adverse consequences for legislative and governmental control of and accountability for the provision of virtually all services provided by the provincial government or provincial public institutions, from Crown corporations to regulatory bodies. The Act is also intended to facilitate the privatization of services provided by municipalities and local public bodies, including school boards and public hospitals. The notion that the Act is somehow limited in scope to *Service Ontario* is entirely unfounded.

In fact, the bill gives Cabinet sweeping powers to authorize contracting out or privatization[1] of any and all "Ontario Government Services" (government services or 'OGS') to various persons or corporate entities including private, investor owned companies that may be foreign controlled. Once that authority is given, there is no requirement[2] for transparency or

[1] As we use the terms, the difference between contracting out and privatization is one of degree. A two-year contract for municipal waste collection would fall for into the former category – a 60 year P3 contract to build, finance and operate a public hospital into the latter. It is also accurate to describe both modes as forms of privatization.

[2] While terms and conditions may be imposed on the exercise of the Minister's authority to contract out or privatize public services, there is no requirement for any such conditionality. The same is true for any service agreement the Minister is to establish.

accountability for privatization decisions made by the Minister or the quasi-Crown corporations similarly empowered under the *Act* – and this is true regardless of the character, scale or importance of the services in question.

Even more problematic is the fact that in key respects the authority of Cabinet and the Minister under the Act overrides the requirements of any other statute where a conflict arises. This effectively subordinates other statutes, and the authority of the legislature, to that of Cabinet in regard to contracting out or privatizing government services. Furthermore, the open-ended and prospective nature of the Act makes it impossible for the legislature or the public to understand, let alone assess, the likely impacts of the Act.

Because of the complexity, we have attached a reference to the Act's key provisions, which we have paraphrased. .

Overview

Under the *Government Services Act* virtually all public services provided by the provincial government, its agencies or tribunals may be contracted out or privatized in one of the various modes authorized under the Bill, from P3s to simple privatizations. Thus, the public health care insurance plan of the province could be contracted to a US based HMO; the electricity system of the province placed under the management of EDF Energy [the UK equivalent of the now defunct Enron Corporation]; or provincial highways, together with the right to collect tolls, could be assigned to the consortium that now controls Highway 407.

We offer these provocative examples not to suggest that the current government plans to take such action, but to emphasize the fact that nothing in the Act would preclude this or some future government from privatizing these services, or require public notice or legislative oversight before it did so. Moreover, and as noted, each of these privatizations could proceed even if in conflict with other provincial laws and policies because the Minister's authority under the Act has priority in the case of such conflicts.[3]

The *Government Services Act* would establish a regime for contracting out or privatizing "broader public services" (BPS) provided by municipalities and many other local entities, from school boards to public hospitals. Thus 'local' government entities are authorized under the Act to contract out or privatize any or all of the public services they provide to one of the corporate entities ("Part V service provider" under the Act) the provincial government may establish to provide such services.

The Act also provides a vehicle for facilitating the sale of provincial assets and property without requiring the government to return to the legislature for authority to effect such sales - the critical requirement that allowed to sale of Hydro One to be stopped in court. .

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[3] See ss. 26(2), and 33(1), and also note s. 3(6).

In spite of its obvious and far reaching implications for the delivery, availability, quality and cost of privatized public services, we understand that little if any rationale for the Act has been offered by the Government, and no assessment whatsoever provided of its potential consequences. The very brief parliamentary debate about the Act appears have focused on the Act's potential impact on Service Ontario, but as noted, its reach in respect of public services is all-encompassing. Whatever the Government's intentions, the provisions of the Act speak for themselves.

We also understand that it has been suggested that that much of the authority to contract out or privatize government services already exists. This of course begs the question of why the Act was considered necessary in the first place. While there is some validity to this claim with respect to BPS, even a superficial review of this legislative scheme reveals that many of its elements are unprecedented.

For example, and as noted, the authority to contract out provincial government services is centralized under the Act and placed in the hands of the Minister (responsible for the Act) or quasi-Crown corporations empowered under it. Thus decisions about contracting out water quality testing services, the granting of forest harvest licenses, or the development of school curricula would no longer be made by the Ministers of the Environment, Natural Resources or Education respectively, but by the 'privatization' Minister.

More importantly, there is no requirement in the Act for such decisions to accord with the objectives of environment, forestry or education legislation. Indeed the Act provides that in several respects, conflicts between Act and other statutes are to be resolved in favour of the former[4]. In other words the Minister responsible under the Act is empowered to privatize health care services, even where the Minister of the Health would be precluded from doing so.

Moreover, the authority to contract out or privatize public services is entirely unguided by any provision in the Act setting out the purpose, policy or criteria that such privatization is to achieve or satisfy.

Similarly, we are aware of no precedent for authorizing an investor-owned company to charge fees for provincial public services (for example for health care or highways) and/or other fees on "its own account", and then retain that revenue "in spite of the requirement of Part I of the *Financial Administration Act*" prohibiting such a practice.

International Services and Investment Treaties will Lock In Privatization

Also highly problematic is the fact that the Act appears to have been crafted with no regard for the consequences of privatization in light of Ontario's obligations under international investment and services agreements.

[4] Idem.

Once government services - both OGS and BPS - are contracted out on a commercial or competitive basis, any attempt by future governments to restore such services to the public sector would be inconsistent with the *WTO General Agreement on Trade in Services* (GATS) and with the proposed *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA).

To retain the authority to 'contract-in', Canada and/or Ontario must preserve that right under both the GATS and CETA. But Ontario has proposed (but not yet secured) Annex II reservations against the "market access" rule of the CETA in only three sectors: energy, renewable energy and agriculture.

In addition, Canada has proposed relevant Annex II reservations, from which Ontario would benefit, in the following sectors: aboriginal affairs, fisheries, public law enforcement and correctional services, and with respect to income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care "to the extent that they are social services established or maintained for a public purpose." It is entirely conceivable that a dispute settlement panel could interpret the act of contracting out as negating the public purpose criterion, hence exposing even these listed social services to the full force of the CETA.

It is important to recognize that once a service is contracted out, restoring a public monopoly is prohibited in covered sectors, *whether or not a foreign service supplier actually obtains the contract and whether or not foreign service providers are even present in the sector.* In other words, once market access is granted by contracting out government services, it cannot be revoked by future governments.

If a foreign investor or commercial service provider actually obtains the contract, this creates additional liabilities. If such contracts are wound down as contemplated by the Bill, foreign investors could avail themselves of the investor-state dispute settlement provisions of the *North American Free Trade Agreement* (NAFTA) or those in the proposed CETA to seek compensation for the "expropriation" of their investments. There are no reservations permitted against the expropriation–compensation provisions of either the NAFTA or (almost certainly) of the proposed CETA.

Another problem arises in regard to s. 24 of the Act, which provides that certain restrictions may be imposed on investor-owned corporations that are contracted to provide government services, but requirements that would limit or qualify the rights of foreign investors as contemplated by this provision of the Act are simply not permitted under NAFTA rules.

The current challenge by Japan and the EU to the *Green Energy Act* illustrates the pitfalls of privatization and deregulation. But this serious international 'trade' dispute does not appear to have been taken into account in crafting the *Government Services Act.*

In sum:

In our opinion, basic principles of good governance require that major changes to how government services are to be provided ought to be the subject of discrete legislation that clearly articulates the purpose of those changes, as well as the quality standards that must be met by service providers, how the contracted services are to be paid for, and an assessment of the costs to governments and the public of providing and purchasing them. The proposed Act leaves these and other vital matters entirely to the discretion of Cabinet, the Minister responsible for the Bill or to the private persons or corporate entities to which the delivery of government service has been contracted. It should therefore be withdrawn.

Sincerely,

Steven Shrybman
SACK GOLDBLATT MITCHELL

KEY PROVISIONS OF THE:

Government Services and Service Providers Act, 2012

Cabinet may authorize the Minister (responsible for the Act to contract out any and all Ontario government services to any person or entity.

Under s. 2, Cabinet may authorize the Minister (responsible for the Act), or a Part V corporation without share capital (such as the Ontario Power Authority or health services, for example) to enter into agreements **with any person or entity** for the provision of Ontario government services, and may impose conditions and restrictions on that authority.

Any person, entity or Part V corporation without share capital may be authorized to provide OGS.

Under s. 3 (1 and 2) a Part V corporation without share capital, or any person or entity, may be authorized, by regulation, to provide the services on behalf of the Crown, the government, a ministry, a government official, a Crown agency or any other board, commission, or authority or unincorporated body.

Any person or entity providing OGS may collect fees for services or on its own account which it may be authorized to retain.

Under s. 6 (1) Cabinet may, by regulation, authorize a person or entity providing Ontario government services to collect fees for the provision of those services. Under 6 (3) those fees may be retained by that entity despite Part I of the *Financial Administration Act* or any other Act; and under 6 (5) fees may also be charged by that entity "for its own account".

In other words, individuals or companies authorized to provide OGS may be permitted by regulation to:

- retain the fee required by government as compensation for providing the service; and
- charge a fee over and above the government required fee for "its own account"

Moreover, s. 6 (3) overrides Part 1 of the *Financial Administration Act* which requires that every person who collects or receives public money must pay all money coming into its hands to the credit of the Minister of Finance.

All services provided by municipalities, public hospitals, school boards and many other public entities may also be contracted out or privatized.

> Under s. 10 a Part V service provider (which includes a private for-profit corporation) may provide broader public services for a municipality; a local board, any other authority, board, commission, corporation, office or organization of persons some or all of whose members, directors or officers are appointed or chosen by a municipality; a university, college of applied arts and technology or other post-secondary institution; a board as defined in the *Education Act*; a hospital within the meaning of the *Public Hospitals Act*; and such other persons or entities as may be specified by regulation, if authorized by that entity to do so.

Part IV deals with personal information and privacy – and has not been reviewed.

Various corporate vehicles, including investor owned business corporations, may be established or authorized to provide OGS.

> Under s. 22 (1) Cabinet may for purposes relating to the provision of public services authorize the establishment of corporations without share capital; or may authorize the Minister to establish corporations under the *Corporations Act* or the *Business Corporations Act* or to acquire one or more corporations with share capital.
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> Under s. 22 (2) For the same purposes Cabinet may authorize the Minister to enter into one or more partnerships (public-private partnerships) on such terms and conditions as it considers advisable.

The power of the Minister or a Part V corporation without share capital to contract out or privatize public services is paramount and may be delegated.

> Under s.26 (1) the Minister may be required or permitted, by regulation, to exercise powers, functions or duties under any Ontario statute, excluding the power to make a regulation or conduct a hearing, review or appeal; and establish notice, licence, permit, registration or other requirements;
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> Under s. 26 (2) A regulation under subsection (1) prevails over a different requirement imposed by any other Act or regulation.
>
> Under s. 26(4) A regulation may authorize the Minister to delegate any of his or her powers, functions or duties described in paragraph 1 of subsection
>
> Under s. 27(1) A Part V corporation without share capital may be authorized, by regulation, to do any of the things described in paragraph 26 (1) in connection with the provision of Ontario government services under this Act by the corporation.

Under s. 27 (2) A regulation under subsection (1) prevails over a different requirement imposed by any other Act or regulation.

Equity interests in corporations providing OGS may be acquired, held or disposed, as may the assets of these entities.

Under 29 (1) Cabinet, by order, may authorize the Minister to, *inter alia*, acquire, hold, dispose of and otherwise deal with the securities, assets, liabilities, rights, obligations, revenues and income of a corporation established or acquired under Part V.

The transfer and sale of public assets may be carried out without government oversight.

S. 30 (1) provides:

> Despite any other Act but subject to section 11.1 of the *Financial Administration Act*, real or personal property that is owned, leased, used or occupied by the Crown in connection with an activity carried out by a Part V service provider may be transferred to the service provider, with or without consideration, upon the terms approved in writing by Treasury Board.

As noted, a Part V service provider may be a for-profit entity, which under s. 29 the government is empowered to wholly privatize. These powers would have allowed the sale of Hydro One, notwithstanding the provisions of the *Electricity Act* at the time, which the Court found to preclude such a sale. It would apply as well to the sale of any other provincial asset from the LCBO and the Ontario Lottery Corporation, to the Ontario Clean Water Agency .

33. (1) Section 3 of this Act, and the regulations made under it, prevail over any other Act.

The empowerment of individuals and corporations Part V corporations to provide Ontario Government services, and in the case of the latter provide municipal and other local public services takes priority in the case of a conflict with any provincial statute that might preclude or limit the extent to which private entities may provide public services.

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SS:lbr/cope 343