

May 23, 2026

HRPC File No. 999999

## PRIVATE & CONFIDENTIAL

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**By Email Only: [Charlotte.Smaglinski@ontario.ca](mailto:Charlotte.Smaglinski@ontario.ca)**

Dear Superintendent,

**RE: Submissions on Review of Ontario Career Colleges Act, 2005—Postings  
For Comment on Ontario’s Regulatory Registry**

My submissions will be pointed, but still as exhaustive as they can be given the short time frame that I have had to make these submissions. I am hopeful that they are helpful and appreciated Noel Abbott sending your memorandum of April 9<sup>th</sup> regarding same. Headings and numbering, including Proposal numbering, are mine. They follow MCURES’ posted content links but are for reference only.

### I. **Background**

My background can be found at [www.harrisrosen.com](http://www.harrisrosen.com). As you know, I have been a regulatory lawyer advising private post-secondary institutions (private career colleges and private training institutions across the country) for more than two decades of my 32 years of practicing law. My stakeholders include private equity groups on the “buy” side, private career colleges, language institutions, “exempt” corporate training institutions, and other law firms. I am fractional counsel<sup>1</sup> to a number of institutions who are your registrants today. And to many who are not, including exempted post-secondary

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<sup>1</sup> Similar to an in-house counsel role but still external.



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institutions, and inspected private high schools in both Ontario and their equivalent in British Columbia.

I have been regulatory counsel to numerous public-private partnerships, and on transactions in the high hundreds of millions of dollars in Ontario and B.C. over the past seven years – all of which have closed. Some of these transactional files have involved private degree granting institutions. I have on rare occasion even represented students—typically on egregious issues of importance to the private career college sector, such as where rogue institutions may be harming the sector via their unlawful conduct, or harming students. Or in catastrophic academic fraud cases<sup>2</sup> against major universities. I typically do not represent industry associations, as the interests of the associations may sometimes conflict with the interests of my clients.<sup>3</sup>

I co-authored the first and second editions of Thomson Reuters' textbook on the regulation of private career colleges with Alan Wolfish K.C. (now retired, and formerly Legal Director at the predecessor Ministry to MCURES). I will be releasing another publication shortly on the regulation of private post-secondary institutions, unrelated to the Thomson Reuters publications.

## II. My Comments

My comments generally echo the sentiments of what I hear daily from my clients, though I am not speaking for them individually in these submissions. Your registrants<sup>4</sup> do not always feel comfortable without counsel and/or a registered lobbyist, to convey their message to you and your designates. While the provincial government is to be applauded for coming a long way on minimizing any culture of fear<sup>5</sup>, you can hopefully understand how your registrants may be afraid to raise some of the issues raised herein. This is so, even when they are compliant or even exemplary registrants.

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<sup>2</sup> Including alleged personation, unauthorized assistance, plagiarism, etc.

<sup>3</sup> Whether a business conflict or legal conflict which would preclude me from representing parties under the Law Society of Ontario's Rules.

<sup>4</sup> My clients.

<sup>5</sup> of potential reprisals by the regulator.



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While I have been honoured to be in an advisory capacity in the past to some of the industry associations<sup>6</sup>, my comments herein do not represent the associations. My role as legal advocate has positioned me to deliver news to government agencies in a manner that is perhaps synergistic, but also different from the messaging of the associations. Even where the government may not agree with my comments or suggestions, it assists my stakeholders when they are heard, and will hopefully allow you to consider significant gaps in the current legislation.

Generally, my points on all aspects of your five-year review fall into two categories:

1. **Achieving Business Certainty for Stakeholders** (Institutions and Students); and
2. **Using a "rule of reason" versus *per se* liability** rule on these matters e.g. student enrolment contracts.

Any notion that these objectives are inconsistent with the consumer protection mandate of the enabling legislation, should respectfully be rejected. The License Appeal Tribunal<sup>7</sup> and the courts had long ago expressly acknowledged the important role of private institutions, and noting that the health of these private training institutions is inextricably linked to student success and student protections.

### III. **Specific Proposed Amendments to Streamline Financial Protections for Students**

#### ***Updated Fee Thresholds***

According to the regulatory registry<sup>8</sup> the government proposes the following changes:

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<sup>6</sup> Which do play an important role within the sector.

<sup>7</sup> "LAT."

<sup>8</sup> <https://www.regulatoryregistry.gov.on.ca/proposal/53733>



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*Proposal 1. Changing the fee threshold for programs exempt from the Superintendent's approval from \$2,000 in total fees to \$3,000 in compulsory fees.*

**My commentary:** I agree with this proposal, but would suggest that you raise the threshold to \$4000 and not \$3,000. There are several reasons for this:

- a. **Parity/Consistency with British Columbia.** The \$4000 threshold is currently the one used by British Columbia's Private Training Institutions Regulatory Unit ("PTIRU")<sup>9</sup>. Largely for purely constitutional reasons<sup>10</sup>, private post-secondary institutions already struggle to "sell" a consistent brand of education product *intra* Canada, which is also germane to operators' ability to achieve student success and meet and exceed learning outcomes. There are 10 different "brands" of higher education being marketed and sold "domestically" and "exported" to international students<sup>11</sup>. That means institutions have an enormous burden on them to distinguish themselves both internationally and *intra*-nationally, which in turn means spending marketing dollars. As someone doing a significant amount of work in Canada's largest higher education markets, I have no reason to believe that B.C.'s \$4,000 threshold<sup>12</sup> has in any way prejudiced students. B.C. is as stringent a jurisdiction as any<sup>13</sup>. However, the parity among jurisdictions will allow most private colleges<sup>14</sup> to achieve some consistency in messaging. It's a small step in the right direction.
- b. **'Less Government is Good Government,'** to paraphrase US President Thomas Jefferson. Ronald Reagan would later be quoted as saying "the scariest nine words in the English language are "I'm from the government and I'm here to help." I'm not minimizing your important role as a regulator: it is critical that

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<sup>9</sup> Which recently combined to merge the Private Training Institutions Branch ("PTIB") and Education Quality Assurance ("EQA").

<sup>10</sup> These institutions are regulated provincially, not federally.

<sup>11</sup> Despite the significant scaling back of international students in 2024, attracting the right foreign students is still critical to Canada's labour market demand and GDP.

<sup>12</sup> Versus a lower threshold.

<sup>13</sup> EQA in particular, has had very rigid rules relating to quality assurance.

<sup>14</sup> Ontario and British Columbia are far and away the largest aggregate markets by revenue for these institutions.



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MCURES exist to protect students where needed, and despite predominantly representing private institutions, I myself have relied on your designates to try to flush out truly “bad” actors. However, I urge you to give life to red tape reduction legislation. It will ease your own burden as a regulator as well.

*Proposal 2. Replacing the current \$500 service fee that a career college can retain when a student is owed a refund with:*

- (1) a non-refundable application processing fee of up to \$250 before a student contract is signed; and*
- (2) a cancellation charge of up to \$1,000 if a student withdraws from the program after the cooling-off period has passed.*

**My commentary:** I would favour keeping the \$500 service fee in place when a student is owed a refund *and* allowing a non-refundable application fee. These are separate and distinct, and the administration and regulatory costs to your registrants have increased significantly because of the lack of business certainty relating to each of federal immigration policy<sup>15</sup> and “downloaded”<sup>16</sup> ISP process.

I’m in agreement with allowing institutions to charge a reasonable cancellation charge after the cooling-off period has passed. I will decline to comment on what that should be.

### ***Strengthened financial protections and transparency for students***

*Proposal 3: Extending the cooling-off period for students to rescind their contract and receive a full refund from 2 days to 7 days (or the date of the start of their program if it is earlier than 7 days).*

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<sup>15</sup> The government’s policy pivots on international students, study visas, Post-Graduate Work Permits (“PGWP”) and Provincial Attestation Letters.

<sup>16</sup> The International Student Program (“ISP”) is a delegated process.



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**My commentary:** I am not in favour of allowing this. There must be an element of *caveat emptor* for students because consumer protections laws and your enabling legislation are already in place to protect student interests. Respectfully, institutions could *voluntarily* extend the cooling off period under their enrolment contracts if they wanted to and to remain competitive<sup>17</sup>, but you have disparate program durations, and this will impact registrants differently. A longer cooling off period may also be a selling feature for some institutions.

*Proposal 4. Introducing a 10-day deadline for career colleges to provide refunds to students who rescind their contract during the cooling-off period.*

**My commentary:** I would generally support any reasonable deadline for colleges to provide refunds to students who properly rescind their contract during the cooling off period. It is important for students to be able to pivot into another program and use the same funds to finance their education. I will decline to comment as to whether 10 days is appropriate, and would defer to your registrants collectively, and the associations on this.

*Proposal 5. Confirming a 30-day deadline for career colleges to provide refunds in all other circumstances when students are entitled to them.*

**My commentary:** I would generally support any reasonable deadline for colleges to provide refunds to students who are entitled to refunds, but determining when a student is “entitled” to a refund is a nuanced question. For example, pursuant to Ontario Regulation 415/06, ss.20 and 22, student enrolment contracts are “voidable by the **student**”, not the Superintendent.<sup>18</sup> The requirement should clearly state that any deadline is based on a *finding* by the Superintendent that the student is owed a refund.

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<sup>17</sup> They may even wish to exceed 7 days.

<sup>18</sup> There is a live question as to whether the Superintendent can or should “void” the contract, entitling the student a refund.



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Regarding s.20 voidability questions, the Superintendent should not *initiate* the process of a refund but should simply *uphold* refunds where there is a clear entitlement to them by the student. Students may also improperly weaponize retrospective requests for refunds after they have graduated/credentialed. While there are clearly instances when students may still be entitled to refunds in such scenarios<sup>19</sup>, retroactive or retrospective refunds should be viewed with skepticism, especially wherein the student has gainful employment and there is a minor breach by the institution.

Proposal 6. *Clarifying that career colleges must issue full refunds to students when unapproved programming is delivered.*

**My commentary:** I agree with this, but there must be a *finding* by the Superintendent that the registrant's program is unapproved. Otherwise, opportunistic students might characterize "unapproved" as rescheduling some classes or other *de minimis* departures from the "delivered as approved" protocol of the Superintendent.

### ***Simplified Requirements***

Proposal 7. *Clarifying which provisions of the OCCA do not apply to students whose education is funded by a third-party organization.*

**My commentary:** I agree with any clarifications that will create more business certainty. Third party funding had existed as an exemption by custom rather than as a formal exemption under the OCCA, but here's where the adage "less government is good government," applies. The Superintendent and her designates are already overburdened. To the extent that an institution is not advertising to or enrolling members of the general public *and* individuals in the program are entirely third party funded, less is more.

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<sup>19</sup> Such as where there is fraud by the institution and/or entire modules were never taught owing to no fault of the student, i.e. not a *de minimis* breach of the *Ontario Career Colleges Act, 2006* ("OCCA").



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Proposal 8. *Simplifying the categories of fees that a career college must report to the Superintendent by requiring all compulsory fees to be reported but not requiring optional fees to be reported (optional fees must still be set out in a student's contract).*

**My commentary:** Again, I agree with any clarifications that will create more certainty. “Fee” has traditionally included an “application, administrative or tuition fee,” in accordance with subsection 1(2) of the OCCA. Institutions could theoretically pass on their TCAF premiums, a “rent” surcharge, or even heating and hydro. While doing so may create reputational issues for an institution and not be commercially prudent, there are other forms of options fees<sup>20</sup> that must be addressed and where more leeway is given to institutions. Yes, optional fees should still be disclosed in a student enrolment contract to ensure that students understand and can meet their financial burden, but as an aside full tuition refund entitlements should never be triggered by honest operational mistakes—versus wilful deception.

Proposal 9. *Clarifying that “international student fees”, which must be reported as compulsory fees, can only be charged to international students as defined in the legislation.*

**My commentary:** Agreed.

Proposal 10. *Eliminating a provision that allows a career college to cancel a contract if a student fails to attend within the first 14 days of the program.*

**My commentary:** I disagree, unless there is a clear accommodation or human rights-based rationale for the student’s attendance failure pursuant to the *Human Rights Code*, and *not* the OCCA. There is no valid basis to fetter an institution’s discretion in this way. Post-secondary students are adults, and this proposal would give them far more protection than private inspected high schools must provide to

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<sup>20</sup> Such as jet fuel for flight training schools, which cost is multiples of the already sky-high price of gasoline based on current world events.



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individuals of a tender age.<sup>21</sup> Human rights legislation exists, and the Superintendent and her designates should respectfully not veer into this lane. The Superintendent's jurisdiction should remain focused on pedagogy, learning outcomes, and consumer protection *relating thereto*.

### ***Access and transparency for students***

Proposal 11: *Requiring career colleges to have a physical head office that is not a residence and to meet with students in person upon request.*

**My commentary:** I must reserve on this question but offer some commentary. First, the Proposal does not specify where the physical head office must be, although the Proposal strongly implies that registrants should have to have a local office in order to host in-person meetings with students. Secondly, the Superintendent's power of "Inquiry" under s.38<sup>22</sup> is limited to premises that are not a dwelling house<sup>23</sup> and I must wonder whether and how this has factored into the proposed requirement? It is important to ensure that the Superintendent has broad search powers to censure bad actors, but if the concern is with search powers<sup>24</sup> there may be other ways to effectively deal with this.

Proposal 12. *Requiring career colleges to publish their student complaint procedures on their publicly accessible websites or post them in conspicuous locations at each campus.*

**My commentary:** Less government is good government! I strongly disagree with this for a number of reasons. First off, these students are adults, and they have not only

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<sup>21</sup> Consider this as a broader comment, that the protections afforded to students attending Ontario's private high schools are far fewer than those post-secondary students who would be expected to understand what they are contracting for.

<sup>22</sup> Which is also a warrantless search power limited to regulatory purpose.

<sup>23</sup> Subsection 38(4), OCCA.

<sup>24</sup> Such as where a registrant is running an online institution from a dwelling house, though I am unaware of any.



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signed an enrolment contract, but are asked to “acknowledge” the contents of the four corners of their agreements. Such contents include *all* of the protections which the Superintendent gives them. Once you compel an institution to start posting a Student Complaint Procedure that has already been acknowledged by the student, you are compelling the institutions (and I say this with great respect) -- to wear a metaphorical “kick-me” sign. Secondly your registrant’s programs often span two years, and some are as long as five years. Their Student Complaint Process may change, even if such changes are modest. Any such changes can be dealt with by way of a rights reservation in the student enrolment contract itself, and subsequent rider or amendment to the Student Enrolment Agreement.

Please don’t burden institutions by compelling them to publish rules in more than one central place. Policing institutions for false advertising<sup>25</sup> is one thing. Creating more onerous requirements for institutions is quite another. Thirdly, you, “the government,” will be perceived to be creating and may in fact be creating additional confusion over which of the institution’s complaint processes prevail.<sup>26</sup> There are stringent enrolment contract requirements already. All institutions have a duty to ensure that a student has received the agreement, and the student has a duty to acknowledge same. The Student Complaint Procedure should be spelled out *once*, and always in one place.

*Proposal 13. Requiring career colleges to specify the address where students will participate in a practicum on the student contract.*

**My commentary:** I will defer largely to my own stakeholders on this, but expect that this can be a moving target for some types of institutions.<sup>27</sup> I would ask that the Superintendent use a rule of reason on this issue too. To be clear, where it is disclosed

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<sup>25</sup> Spot checking or based on credible information received.

<sup>26</sup> There are Sexual Violence Policy requirements and often Professional Governing Body and Accreditor expectations.

<sup>27</sup> Such as Personal Service Worker programs where nursing homes may have variable and changing needs.



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by an institution that a practicum location is variable but will be within the same geographical locus<sup>28</sup>, this should suffice.

Proposal 14. *Clarifying that career colleges cannot require students to waive their rights under the OCCA.*

**My commentary:** I strongly oppose this Proposal. You are respectfully veering into the lane of the courts. If your objective is to ensure that students do not get duped into waiving rights they have under statute, the law already restricts/protects all parties from “contracting out of statute” and in relation to certain unconscionable settlement provisions. There is respectfully no valid basis for you to police this.

Proposal 15. *Expanding authority for the Superintendent to publish a variety of enforcement actions taken against career colleges under the OCCA.*

**My commentary:** Without any additional specificity, I oppose this. The Superintendent already has broad warrantless search power under s.38 and the power to “AMP”<sup>29</sup>. And to issue Restraining Orders and Compliance Orders. And to conduct rigorous audits. The reputations of institutions are built up over years, and lost in seconds on the web, where you prematurely<sup>30</sup> exercise overreach.

Rather than focus on the idea of “publish,” presumably to warn prospective students<sup>31</sup>, the Superintendent should instead be focused on having institutions meet merit-based pedagogical milestones. Consumer protection laws already protect students, and the mechanisms are in place through other government agencies both federally and provincially. These other agencies are uniquely established to deal with the policing aspects that may be required.

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<sup>28</sup> Example: Greater Toronto Area.

<sup>29</sup> Used as a verb here i.e. Issue Administrative Monetary Penalties.

<sup>30</sup> Even if and where in error.

<sup>31</sup> Despite being a seemingly worthy objective.



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## ***Robust enforcement protocols***

Proposal 16. *Adding a provision directing the Superintendent to consider student interests when making decisions under the Act.*

**My commentary:** I disagree with this. First, it's unnecessary because it is implied that *all* of your enabling legislation is student protection focused. Secondly, the legal maxim "*expressio unius est exclusio alterius*"<sup>32</sup> recklessly excludes the mention of your registrants. Respectfully, the omission of your registrants in such a provision would imply that their interests are unimportant or to be disregarded. The courts have to interpret legislation. Such a provision will be weaponized in frivolous human rights claims and civil matters, despite the courts and the LAT having both shown a nexus between strong and healthy registrants and consumer<sup>33</sup> success, i.e. a win-win.

Proposal 17. *Ensuring the Superintendent can place conditions on a program's approval at any point in the program's registration.*

**My commentary:** I agree with this subject to restrictions established by case law, but you have the power to do this already pursuant to subsection 15(2) OCCA. There should be no need to make further amendments to the OCCA or issue a Policy Directive regarding this. It is simply overkill and especially following "red tape" legislation which was supposed to streamline and simplify these processes.

So what "restrictions" am I referring to above? Specifically, the restrictions found in the landmark Supreme Court of Canada case of *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>34</sup> which gives life to the "doctrine of legitimate expectations": where you have created legitimate expectations for a licensee and then abruptly pivot<sup>35</sup>, you should forbear from regulating. Similarly, I ask that you follow the principles of *Stetler v.*

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<sup>32</sup> Literally meaning "the mention of the one excludes the other."

<sup>33</sup> In this case "student" success.

<sup>34</sup> 1999 CanLII 699 (SCC), [1999] 2 SCR 817

<sup>35</sup> Whether via policy or new conditions.



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*Ontario Flue-Cured Tobacco Growers' Marketing Board*<sup>36</sup> where the courts independently acknowledged the sanctity of any registrant's livelihood.<sup>37</sup>

Proposal 18. *Introducing new administrative monetary penalties for contraventions of requirements in the Act and its regulations.*

**My commentary:** While I agree that AMPs are necessary, my own view is that you have a significant arsenal at your disposal already. The issue isn't that the law needs to be changed on this<sup>38</sup> but rather the administration of these AMPs. Representing a myriad of stakeholders<sup>39</sup> I can't help but agree that bad actors need to be isolated. However, *never* at the expense of due process. A bigger issue for me is also a very sensitive issue for the government and it is enumerated nowhere in the five year review proposals: *AMP revenues should not go into the government's Consolidated Revenue Fund, but should instead (and respectfully) be reinvested into the sector.* The sector has suffered profoundly, since the federal government had veered into and/or impacted provincial jurisdiction and the regulation of higher education in early 2024.<sup>40</sup>

Proposal 19. *Directing the Licence Appeal Tribunal (LAT) to consider the interests of students under the OCCA when making decisions.*

**My commentary:** Unnecessary, and since the LAT is a court of competent jurisdiction charged with dispassionately interpreting consumer protection legislation, they would likely not, nor should they, concern themselves with any direction from MCURES.

Proposal 20. *Amending the obstruction offence to prohibit 1. interference or attempting to interfere with an inquiry or examination, 2. providing false or misleading statements or*

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<sup>36</sup> 2005 CanLII 24217 (ON CA)

<sup>37</sup> This is not specific to career college registrations, but applies to any license issued by the province or federally.

<sup>38</sup> Although I would gladly comment on anything more detailed.

<sup>39</sup> Most with exemplary track records.

<sup>40</sup> When sweeping and abrupt changes were made to Designated Learning Institution parameters, Post-Graduate Work Permits and Study Permits.



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*documents in response to an inquiry or examination, including unintentionally, and 3. including false information in any document required to be submitted under the Act.*

**My commentary:** Unnecessary, since obstruction subsumes any wilful “interference” already, or wilful provision of false or misleading statements, documents, etc. As an aside, the section 14 registration requirements are perpetual, and such conduct would raise grounds for a Notice of Proposal to Revoke a Registration. It’s overkill, antithetical to existing red tape legislation, and there is nothing you cannot already do in the scenarios described under the current legislation.

### ***Administrative clarifications***

*Proposal 21. Clarifying that requests for new campuses and campus re-locations require Superintendent approval.*

**My commentary:** This is a more operational concern which I will leave to my clients to comment on.

*Proposal 22. Confirming a deadline of 30 days for the payment of additional financial security required when renewing registration.*

**My commentary:** I disagree with this. You should respectfully use a rule of reason versus a *per se* rule. I suggest you make this a guideline only: where, for example, the increased amount is in dispute and the institution is asking you to forbear or use your discretion, I would like to see a judicious approach. There are also circumstances where banking requirements<sup>41</sup> that are not visible to the Superintendent’s designates require a longer horizon.

*Proposal 23. Establishing that changes to maximum class size and maximum number of*

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<sup>41</sup> Including Loan to Value Ratios, etc.



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*concurrent cohorts are considered significant program changes requiring approval of the Superintendent.*

**My commentary:** I would defer to my stakeholders on these questions, but the concern I have is the slow turn-around time from your designates owing to backlog. This has been a challenge for them on many fronts.

#### IV. Other Issues to Consider on Review

I am hopeful you'll consider these additional points, beyond the issues which you've invited stakeholders to comment on.

##### ***Business Certainty***

###### ***Access***

- a. Links to all current laws, Policy Directives (which have the force of law), and Superintendent's Memoranda should transparently be in one place on the web, and easy to locate. Except where there is a clear public policy basis for excluding members of the general public from access. Such access should follow the open court principle of access.
- b. All of your registrants should have access to information at the same time, whether institution owners, advisors, or associations. Even non-registrants should have quick access to most information, but especially if they are operating as an exempt entity by design.

###### ***Dialogue with Federal Government***

- c. The Federal government's policies or policy changes (e.g. CSFA, IRCC, or otherwise) should not abruptly interfere with the administration of regulation over education, which is a provincial undertaking constitutionally. Greater dialogue with the federal government will hopefully sensitize it to ensuring that there is reasonable notice to



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registrants of proposed policy changes impacting stakeholders and students.

Frankly, the federal government has failed miserably at remaining in its jurisdictional “lane”: it **doesn’t** regulate education, but you do. Recent decision-making over federal loan administration, students grants, and immigration (study permits, Post-Graduate Work Permits, etc.) have had a profound and immediate trickle down impact on the provinces, the institutions they regulate, the investors who fund them, students, to Canada’s labour market demand, and Canada’s GDP on the whole.

The province respectfully should have taken a more immediate and forceful jurisdictional position on regulating its own higher education sector and ensuring that, at a minimum, there was sufficient notice of sweeping policy changes to all stakeholders impacted.

## **Notice**

- d. The doctrine of legitimate expectations expounded in *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>42</sup> is triggered when regulators fail to give sufficient notice of a policy change to registrants, whether by accident or design. Your registrants had legitimate expectations to believe they could follow the government’s earlier policies, and invested time and resources into same.

## **Mid-Term Evaluation Requirement**

- e. This came up in an actual matter that my office handled, and it was ultimately handled well by your designates. Thank you. However, the potential unintended consequences of a mid-term evaluation that extends beyond 50% of the “scheduled hours” are simply too grave and incongruous to the legislated intent, to be ignored. An adverse decision

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<sup>42</sup> 1999 CanLII 699 (SCC), [1999] 2 SCR 817



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relating to *one* student, may open an unintended floodgates challenge by an entire class, and I am using “class” both in the legal sense and the literal sense in this case. That surely was not the intent of the Provincial legislature – versus knowing where a student stands close to the middle of term.

Subsection 12(1) of O.Reg. 415/06 makes a written mid-term evaluation of the student’s progress a condition of program approval. For programs up to 12 months, the evaluation must be given **before half** of the **scheduled hours** of instruction have taken place. For programs more than 12 months in duration, an evaluation for each 12-month period must be given to the student before half of the scheduled hours of instructions for that period have taken place.

The mid-term evaluation does not speak to module completion, weeks, or any other measure but hours. The regulation, as written, sets only a **ceiling** on when the evaluation must be delivered – it must occur before 50% of the scheduled hours have occurred. The regulation does not set a **floor** i.e. a minimum number of hours before the evaluation can be given. On its face, this leads to obvious absurdities. Institutions can “mid-term”<sup>43</sup> a student after just weeks in a full year program. While the word “progress” implies there must be work to evaluate, the legislation must be clarified.

**Recommendation:** A purposive reading of this provision should have the Superintendent applying a rule of reason versus a strict “per se” rule based on hours. While this rule applies to *private* institutions, I would take the same position regardless of whether an institution was public or private (though commentary on public post-secondary regulatory parameters is beyond the scope of these brief submissions).

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<sup>43</sup> Verb!



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While the above recommendation may seem *less* certain from a “business certainty” standpoint, it surely isn’t. The OCCA is consumer protection legislation. The midterm review requirement is in place to ensure that students are meaningfully informed of how they are doing while there is still time to remediate, seek help, or withdraw and obtain a partial refund. The business certainty that your registrants have with the above approach is that the government is not playing “gotcha,” is respecting and administering its student protection mandate, and is respecting the Tribunal’s and courts’ acknowledgement of the importance of private sector education.<sup>44</sup>

**Recommendation:** The Superintendent should have the absolute discretion to reject a student claim wherein there has been no mid-term evaluation until after the 50% of hours demarcation, but where (for example) only a small percentage of the student’s grade has been determined.

Superintendent, you have an absolutely great blueprint to borrow from here. Even under the federal *Competition Act*, Canada’s antitrust enforcement mechanism<sup>45</sup> expressly provides for a rule of reason versus “per se” analysis in the following circumstances:

- a. **Mergers.** Deciding whether mergers unduly lessen competition (ss.92 to 96);
- b. **Abuse of Dominance** (ss. 78 to 79) to lessen price competition;
- c. **Competitor Collaborations** i.e. collusion (s.45(4));
- d. **Vertical Agreements and Resale Price Maintenance** (s.76);
- e. **Exclusive Dealing, Tied Selling, Market Restriction** (s.77);
- f. **Deceptive Marketing Practices** (s.74.01).

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<sup>44</sup> See also *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2005 CanLII 24217 (ON CA), which acknowledged the sanctity of the livelihood of your registrants.

<sup>45</sup> Dealing with far more serious issues that are quasi-criminal.



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You would not be taking away a substantive student right by requiring that students suffer some prejudice before having your designates order refunds.

A defensible practice would be to have your registrants conduct the review at a point where genuine progress can meaningfully be assessed. With tens of thousands of National Occupational Classification Codes<sup>46</sup> and therefore identifiable vocations, you should respectfully resist one size fits all thinking. Imposing a rule of reason *gives* your registrants the certainty of knowing that there is one less “gotcha” provision that can be improperly weaponized—not necessarily by you but by plaintiff litigators creating litigation risk for institutions based on the letter of the law.

### ***Student Enrolment Contracts***

I have generally been very pleased with your designates’ approach to regulatory forbearance on minor discrepancies where contract language is an issue.<sup>47</sup> I have a very simple position regarding s.20.

**Recommendation:** Abolish any *per se* rule that triggers automatic refunds to students. My reasoning is the same as the midterm requirement, but would add the following:

1. *De minimis* breaches<sup>48</sup> where there is no prejudice to the student, should not create refund entitlement.
2. No refund entitlement should exist once the student has obtained his or her credential unless there was fraud or a material portion

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<sup>46</sup> “NOCs”

<sup>47</sup> Often what is at issue is not whether the requirements of s.20, O.Reg. 415/06 have been met, but rather what the remedy should be when variable, program-specific *operational* information in the agreement is vague or incorrect.

<sup>48</sup> For example, where the institution has not signed back the enrolment agreement but has presented it and the student has signed it, and enrolls.



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of the program was never delivered. The regulation has long been silent on this issue.

### ***Sexual Violence Policy***

**Recommendation:** Rescind the requirement altogether. That is not to say that such a policy should not exist, nor do I wish to minimize the importance of such a policy to victims. There are unfortunately true victims of such conduct. However, it, and any other policies required to comply with the *Human Rights Code*, should respectfully not be policed under your legislative umbrella.

Your Registrants must already comply with very stringent human rights laws under the *Human Rights Code*, and you are creating issues of forum-shopping and *Res Judicata* where matters are brought before the Human Rights Tribunal. In fact, this requirement may be unintentionally compromising students who are victims, and in need of assistance.

Just as your registrants must comply with independent federal privacy legislation, so too should you leave human rights law and policies outside of the scope of OCCA oversight.

There is significantly more to say, but I appreciated having been given the opportunity to make these submissions.

All of which is respectfully submitted,

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