Fw: FAA - public accounts - delay

From: "Hatzis, Len (TBS)" <len.hatzis@ontario.ca>
To: "Bromm, William (CAB)" <william.bromm2@ontario.ca>
Cc: "Kearney, Sean (TBS)" <sean.kearney@ontario.ca>
Date: Thu, 15 Sep 2016 23:19:13 -0400
Attachments: FAA - Extraordinary circumstances opinion.docx (54.12 kB)

Here is a rough draft - we need to run it by cloc and ultimately get DAG approval but hopefully no major changes..
Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>
Sent: Thursday, September 15, 2016 11:09 PM
To: Len
Subject: Fw: FAA - public accounts - delay

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Duffy, Stephen (TBS) <Stephen.Duffy@ontario.ca>
Sent: Thursday, September 15, 2016 11:05 PM
To: Hatzis, Len (TBS); McKinlay, Tom (MAG)
Cc: Kaufman, Paul (TBS)
Subject: RE: FAA - public accounts - delay

Len & Tom,

Please see the attached version of the opinion which incorporates previous comments and adds in the other issues that we were asked to incorporate.

Let us know if you have any comments.

Thanks,
Stephen and Paul

From: Kaufman, Paul (TBS)
Sent: September-15-16 10:55 PM
To: Hatzis, Len (TBS); McKinlay, Tom (MAG)
Cc: Duffy, Stephen (TBS)
Subject: Re: FAA - public accounts - delay

Per discussion earlier with Tom we understood mandamus is available vs the crown, but we are flagging possibility of a declaration. Tom?

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Hatzis, Len (TBS)
Sent: Thursday, September 15, 2016 10:51 PM
To: McKinlay, Tom (MAG); Kaufman, Paul (TBS)
Cc: Duffy, Stephen (TBS)
Subject: Fw: FAA - public accounts - delay

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Bromm, William (CAB) <William.Bromm2@ontario.ca>
Sent: Thursday, September 15, 2016 10:51 PM
To: Hatzis, Len (TBS)
Cc: Kearney, Sean (TBS)
Subject: Re: FAA - public accounts - delay

A secondary question outside the scope of the House issue - have you thought about a Writ of Mandamus? I do not think the court would entertain it as it is a matter between the government and the House, but we might want to track it as a potential legal remedy someone could seek. Again, this could be mitigated by the introduction of a Bill to extend the deadline.

(though again I do not like that this concedes the extraordinary circumstances issue)

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Bromm, William (CAB)
Sent: Thursday, September 15, 2016 10:47 PM
To: Hatzis, Len (TBS)
Cc: Kearney, Sean (TBS)
Subject: Re: FAA - public accounts - delay

Some changes for your consideration:

If this issue was raised as a point of privilege, precedent indicates the Speaker will decline to find a prima facie case of privilege on the basis that Speakers should not engage in statutory interpretation in dealing with questions of privilege . The obligation to prepare and table the public accounts arises from a statutory requirement, not from a Standing Order or other rule of the House.

Former federal Speaker Scheer made this abundantly clear in a ruling dated October 24, 2011, where he rejected a member's claim of privilege in connection with the introduction of a federal bill in alleged contravention of the federal Canada Wheat Board Act. In his ruling, Speaker Scheer concluded that it is not the role of the Speaker to enforce requirements imposed by statuteory restraints on the ability of the government to introduce new legislation in the House. He observed the "well-established practice that it is not for the Chair to rule on legal or constitutional matters"_ and further that "the Chair must avoid interpreting, even indirectly, the Constitution, or a statute"._ In a subsequent ruling on the same matter, Speaker Sheer again ruled that "…the Speaker does not make rulings on matters of law; on parliamentary law perhaps, but not on the law of the Constitution or on other laws that affect us."_

Similar Speaker's rulings have been made in Ontario. For example, on April 19, 2010, the Speaker made the following observation regarding the inability to make a ruling based on the requirements of a statute. "In reviewing this matter, I was first of all influenced by Speakers' rulings, including some of my own, in which Speakers have rather consistently declined to deal with legal issues or to become involved in the interpretation of the law. To the extent that this point of privilege revolves around such a legal issue, the Speaker simply is not

in a position to interpret a statutory requirement."

In order to decide a question of privilege on the public accounts, the Speaker would have to not only rule on the statutory tabling requirement itself, but also on whether "extraordinary circumstances" exist to justify a delay which is clearly contemplated by the Act.

As a result, should a member raise a point of privilege regarding the failure to table based on Section 1.0.26(5) of the FAA to support that argument, the Speaker is unlikely to uphold the point of privilege on the basis that he is not in a position to fully interpret the statutory provision .

In addition, even if the Speaker decided to rule on this matter, the Speaker can only find that there is a prima facie case and then it is up to a vote of the House following debate. In the vote, the Minister could argue what she believes the 'extraordinary circumstances' are, and the opposition could counter that argument, but the Speaker will not rule on the question. Ultimately, the majority will decide whether a breach as occurred.

Accordingly, we are of the view that it is unlikely that the Minister or Government would face formal censure from the Legislative Assembly for failing to table the public accounts in the timelines contemplated in the FAA.

OPTIONAL

Finally we would note that the risk of a Speaker's ruling upholding a point of privilege could be mitigated by the introduction of a Bill altering the statutory deadline. The existence of a similar Bill was considered by the Ontario Speaker in 2010. In that case, the question hinged on a statutory requirement to initiate a review of the Local Health Services Integration Act by a date set in the Act. However, prior to the point of privilege, the government had introduced a bill to extend the deadline. While the government was concerned with the length of time the government took to introduce the Bill, the Speaker still acknowledged it was introduced before the statutory deadline had passed and should be taken into consideration. In the case at hand, since the potential need for the extension is a very recent issue, the government could easily argue it had no earlier opportunity to extend the deadline. Note however, it should also be considered that introduction of such a bill could be seen as an acknowledgement by the government that "extraordinary circumstances" do not exist to permit the extension contemplated in the existing provision .

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Hatzis, Len (TBS)
Sent: Thursday, September 15, 2016 10:19 PM
To: Bromm, William (CAB)
Cc: Kearney, Sean (TBS)
Subject: FAA - public accounts - delay

William
Here is the draft on just the narrow issue of political implications of the option to delay under the current language of the Act. Please let me know if any concerns. Thanks

Sent from my BlackBerry 10 smartphone on the Rogers network.