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Memorandum

To: Cindy Veinot, Provincial Controller and ADM, Treasury Board Secretariat

From: Treasury Board Secretariat – Legal Services Branch

Date: September 16, 2016

Re: Section 1.0.26(5) of the FAA

You asked for a legal opinion on whether the present circumstances qualify as "extraordinary circumstances" within the meaning of subsection 1.0.26(5) of the *Financial Administration Act* (the "Act" or FAA) as well as the potential judicial or parliamentary censure risks and any mitigation strategies that could be employed to reduce these risks. This analysis is set out below.

Conclusions

i) Issue 1: Whether the present circumstances qualify as "extraordinary circumstances" within the meaning of subsection 1.0.26(5) of the FAA?

Although there is no direct case on point, we are of the view that there is at least a moderate to moderately high risk that a court would conclude that knowledge that the Auditor intends to issue a qualified report is not an "extraordinary circumstance" within the meaning of section 1.0.26(5) of the FAA. As a result, there is a corresponding legal risk that a court would conclude that the President of Treasury Board (the "Minister") failed to comply with her statutory duty to deliver the Public Accounts within the 180-day time period established by the Act.

ii) **Issue 2: Could non-compliance with the timelines set out in the FAA be challenged by a member of the Legislative Assembly?**

A member of the Legislative Assembly could challenge non-compliance with the timelines in the FAA through a point of order or a point of privilege, however it is unlikely that the Government would face formal censure from the Legislative Assembly for failing to table the Public Accounts in the timelines contemplated in the FAA.

iii) **Issue 3: Could non-compliance with the timelines set out in the FAA be challenged in Court?**

Non-compliance with the FAA could be challenged in court by way of an application for judicial review. As noted above, there is a moderate to moderately high risk that the court would conclude that there are no extraordinary circumstances and grant the application. In granting the application the court would need to find that there was a legal obligation to do the thing at issue (in this case delivery of the Public Accounts in accordance with section 1.0.26(5)) and a failure by Minister to do so. There is also at least a moderate risk that the court would issue a declaration that the Minister was in breach of her statutory duties. In addition, a court could also make an order of mandamus requiring the Minister to comply with her obligation to deliver the Public Accounts within some specified period of time following the issuance of the order.

iv) **Issue 4: What mitigation strategies could be employed to reduce the risk of non-compliance with the timelines set out in the FAA?**

An amendment to the FAA extending the timelines for tabling the Public Accounts could mitigate the legal risks of non-compliance with the current requirements, however these amendments would need to be in force by September 27, 2016. The Province could seek OAGO confirmation about the importance of this matter to mitigate parliamentary privilege risks with non-compliance.

Background

The Office of the Auditor General of Ontario ("OAGO") has questioned the manner in which the Province has treated certain pension assets and whether this is in compliance with PSAB accounting standards**.** The Province has treated assets in this manner since 2001 without incident or objection from the OAGO. Moreover, the OAGO did not raise the accounting of accrued benefit assets as part of the original audit plan in February, 2016 (see appendix 2). This matter was added to an updated accounting plan by June 30th, 2016 (see appendix 2).

Ontario Provincial Controller Division ("OPCD") undertook an open and competitive procurement to obtain an expert opinion on the accounting treatment of these assets. On July 21, 2016 Deloitte LLP ("Deloitte") began work on the expert opinion. Deloitte's opinion is contained in a report that concurs with the Province's assessment. This report was shared with the OAGO on August 19. Despite the Deloitte report, the OAGO continues to object to the Province's accounting treatment of these assets and requested additional analysis on August 26th, 2016. OPCD has undertaken this additional analysis and met with the OAGO on September 1, 2016 to discuss the OAGO's objections.

OPCD maintains that it is unprecedented for the OAGO to raise an objection to the Province's accounting practices of this magnitude at this point in the preparation of the Public Accounts. Additionally, this objection is but one of multiple objections that the OAGO has raised in the preparation of the 2015-16 Public Accounts that have caused additional time and effort to be taken in reaching consensus on results and balances to be presented in the Province's 2015-16 consolidated financial statements.

Issue 1: Whether the present circumstances qualify as ``extraordinary circumstances`` within the meaning of subsection 1.0.26(5) of the *Financial Administration Act?*

i) Relevant Statutory Provisions

Subsection 1.0.26(5) of the *Financial Administration Act* states:

> *(5) Except in extraordinary circumstances, the Minister of Finance shall submit the Public Accounts for each fiscal year to the Lieutenant Governor in Council on or before the 180th day after the end of the fiscal year and the Lieutenant Governor in Council shall,*
>
> *(a) lay the Public Accounts before the Assembly, if the Assembly is in session when the Public Accounts are ready to be laid before the Assembly; or*
>
> *(b) make the Public Accounts public, if the Assembly is not in session when the Public Accounts are ready to be laid before the Assembly, and lay the Public Accounts before the Assembly on or before the 10th day of the next session.* (Emphasis Added)

Responsibility for the administration of section 1.0.26 of the FAA has been assigned to the Minister of Finance and the President of Treasury Board pursuant to an Order in Council under the *Executive Council Act*, with the President of Treasury Board having exclusive responsibility for the administration of subsection 1.0.26(5).[1]

"Extraordinary circumstances" is not a defined term in the Act and it is only used in subsections 1.0.26(5) and 1.0.26(6) in connection with the submission of the Public Accounts. More broadly, the term "extraordinary circumstances" also appears in five other statutes in Ontario. These statutes are:

- *Fiscal Transparency and Accountability Act,* 2004
- *Commodity Futures Act*
- *Securities Act*

[1] O.C. 223/2016

- *Provincial Offences Act*
- *Child and Family Services Act*

The most salient of these provisions is subsection 85(3) of the *Provincial Offences Act*.[2] In that statute, extraordinary circumstances explicitly include labour disputes and disruptions of postal services, power services and technological facilities.

ii) Statutory Interpretation

According to Sullivan[3], in order to determine the legally correct meaning of a legislative text, a court begins by trying to establish its ordinary meaning. In this regard, the ordinary meaning is that which spontaneously comes to mind when words are read in their immediate context.[4] A court tasked with interpreting a statute will use a purposive interpretation method that looks at the words or phrase in its context. Dictionary definitions can be useful in statutory interpretation. The inclusion of a proposed meaning in one or more dictionary definitions is evidence that the proposed meaning is plausible.[5] In this respect, we note that Black's Law Dictionary defines extraordinary circumstances as, "[a] highly unusual set of facts that are not commonly associate with a particular thing or event."[6]

iii) Relevant Case Law

The definition of "extraordinary circumstances" in subsection 1.0.26(5) of the *Financial Administration Act* has not been subject to direct judicial analysis. As such, there are no cases directly on point for the present issue. Nevertheless there are cases that have interpreted the phrase in other contexts. Within the matrimonial property context, the Saskatchewan Court of Queen's Bench relied on Black's Dictionary definition to find that, "the legislature intended 'extraordinary circumstances' to be a circumstance that was not the usual."[7] More recently, a Financial Services Commission of Ontario arbitrator relied upon the Canadian Oxford Dictionary for a definition of "extraordinary" as something that is: 1) unusual, remarkable, or out of the regular course or order; or 2) exceeding what is usual in amount, degree, extent, or size, especially to the point of provoking astonishment, admiration, or disapproval.[8]

iv) Conclusions on the Definition of Extraordinary Circumstances

There is no jurisprudence or statutory definition that defines extraordinary circumstances as this phrase is used within the Act. Nevertheless, based on the principles of statutory interpretation, and judicial treatment of the phrase in other contexts and dictionary definitions, it might be possible to argue that the present situation qualifies as "extraordinary circumstances" within the meaning of section 1.0.26(5) of the FAA. While disputes between the Province and the OAGO

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[2] RSO 1990, c P 33, s 85(3)
[3] Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed (Markham, ON: LexisNexis Canada, 2008)
[4] *Ibid* at 26.
[5] *Ibid* at 37.
[6] Black's Law Dictionary, 7th ed , Bryan A Garner, Editor (St. Paul, MIN: Westgroup)
[7] *Sheridan v Sheridan,* 1981 CarswellSask 120 at 10, [1981] 3 WWR 664.
[8] *Hotchkiss v Kingsway General Insurance Co,* 2011 CarswellOnt 15120 at 14.

over accounting issues arise as a normal part of the auditing process, this particular dispute represents an unprecedented scenario about a matter of great significance that is highly unusual and outside of the normal course of events. The following factual circumstances support this view:

- the Province has not changed its accounting practices with respect to the assets in question since 2001;
- the OAGO has never taken issue with these practices previously and an analysis of this nature was not contemplated in the original audit plan; and
- it was only in late August that the severity of the situation became evident as the OAGO continued to object to the Province's accounting treatment of these assets despite an independent external report that supported the Province's historical practices and measurement of the pension assets in question.

However, we would caution that the court may not accept these arguments. In our view, in order to qualify as "extraordinary", there would need to be some external circumstance, beyond the control of the government, impairing the ability of the Minister to discharge her legal obligation to submit the Public Accounts within 180 days of the end of the fiscal year in accordance with the requirements of section 1.0.26(5) of the FAA. Under this interpretation, "extraordinary circumstances" would refer to circumstances such as:

- a labour dispute that effectively shut down the operation of the Treasury Board Secretariat;
- a major problem with the Ministry's information technology systems; or
- a significant financial event materially altering the economic assumptions on which the government's financial statements have been prepared.

It is worth recognizing that the current dispute between the government and the Auditor General has no legal impact on the ability of the Minister to finalize the Public Accounts and submit them to the LGIC in accordance with section 1.0.26(5) of the FAA. The government is not obligated to come to any agreement with the Auditor General as a condition of submitting the Public Accounts and the prospect of a possible qualified opinion from her is not a legal obstacle to the Minister's compliance with her statutory obligations. In fact, the FAA explicitly contemplates the possibility of the Auditor General rendering a qualified opinion on the state of the Province's consolidated financial statements and the current situation is arguably an inherent component of the scheme established by the Legislature. Moreover, we understand that there have been a number of past instances in which Auditors General have issued qualified opinions in connection with the Public Accounts in Ontario and other jurisdictions within Canada. Viewed in this way, it is difficult to see how the prospect of a qualified opinion from the Auditor General could be characterized as an "extraordinary circumstance" justifying a delay of the Public Accounts process.

As already observed, there is no case law specifically considering the scope of the phrase "extraordinary circumstances" in section 1.0.26(5) of the FAA and, therefore, it is difficult to definitively assess the legal risks in this case. However, for the reasons discussed above, we are of the opinion there is at least a moderate to moderately high risk that a court would conclude that the current circumstances are not “extraordinary” within the meaning of that provision and, therefore, would not excuse a failure by the Minister to comply with her legal obligations in this case.

Issue 2: Could non-compliance with the timelines set out in the FAA be challenged by a member of the Legislative Assembly?

If non-compliance with the timelines set out in the FAA was challenged by a member in the Legislative Assembly, it would be by way of a point of order or a point of privilege that would be ruled on by the Speaker of the Assembly.[9]

It is unclear whether this issue can be raised as a point of order since the requirement does not arise from the Standing Orders or a convention or practice of the House. Even if the Speaker agrees it is a point of order, the likely outcome is a simple confirmation that the rule requiring tabling as contemplated in the FAA exists and must be complied with. Continued breach may then be raised as a point of privilege or contempt.

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, and the Speaker’s jurisdiction is strictly limited to matters of parliamentary procedure. 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 statute. He observed the “well-established practice that it is not for the Chair to rule on legal or constitutional matters”[10] and further that “the Chair must avoid interpreting, even indirectly, the Constitution, or a statute”.[11] 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.”[12]

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."

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[9] Standing Orders of the Legislative Assembly of Ontario, January 2009 at s. 13(a).
[10] House of Commons Debates, 41st Parliament, 1st Session, No. 035 (October 24, 2011) at 1515.
[11] *Ibid.* at 1520.
[12] House of Commons Debates, 41st Parliament, 1st Session, No. 070 (January 31, 2012) at 1015.

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.

Issue 3: Could non-compliance with the timelines set out in the FAA be challenged in Court?

In response to a perceived failure by the Minister to deliver the Public Accounts to the Lieutenant Governor in Council within the time specified in subsection 1.0.26(5) of the *Financial Administration Act*, an interested member of the public (including, for example, an MPP or the Canadian Taxpayers Federation) could bring an application for judicial review. It seems likely that a court would grant public interest standing to such a party because no one would have traditional standing to challenge a failure by the Minister to comply with subsection 1.0.26(5).

As discussed above, there would seem to be at least a moderate to moderately high risk that a court would conclude that the prospect of the Auditor General issuing a qualified opinion would not qualify as an exceptional circumstance and accordingly would not excuse the Minister from her obligation to deliver the public accounts within the 180-day period specified in the FAA. In granting the application the court would need to find that there was a legal obligation to do the thing at issue (in this case delivery of the Public accounts in accordance with section 1.0.26(5)) and a failure by Minister to do so. There is also at least a moderate risk that the court would issue a declaration that the Minister was in breach of her statutory duties.

In addition, a court could also make an order of mandamus requiring the Minister to comply with her obligation to deliver the Public Accounts within some specified period of time following the issuance of the order.

Issue 4: What mitigation strategies could be employed to reduce the risk of non-compliance with the timelines set out in the FAA?

i) Amend the FAA

Notably, 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 Speaker 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.

ii) Seek OAGO Confirmation

Absent a legislative amendment, if the delay in tabling the Public Accounts is due to an arrangement between the Government and the OAGO that is intended to obtain clarity on the proper accounting treatment of certain pension assets, the Government may wish to consider obtaining written confirmation from the OAGO that the OAGO views the accounting treatment of these assets as an important matter that should be clarified in order to provide meaningful information to the Assembly and the public in the Public Accounts and which therefore warrants an extension of the deadline to table the Public Accounts.

Appendix 1

***Provincial Offences Act,* RSO 1990, c P 33, s 85(3)**

Exception for commencing parking proceeding

(3) A justice may extend the time for commencing a parking proceeding where the court is unable to obtain proof of ownership of the vehicle or to send a notice of impending conviction to the defendant within that time because of extraordinary circumstances, including labour disputes and disruptions of postal services, power services and technological facilities. 2009, c. 33, Sched. 4, s. 1 (50).

Appendix 2

Extract from DRAFT Audit Planning Report OPCD_2015-16 Public Accounts_FEB 24 from BP

Pensions and Employee Future Benefits	• Request OPCD obtain from MOF Pension Policy Branch a discussion paper that outlines the derivation of "Management's Best Estimates" used to prepare the actuarial valuations • Compare assumptions made by the Province to those used in prior years and to those used in each individual plan's financial statements. Evaluate the new discount rates and salary assumptions used by the province • Request a year over year analysis for analytical review purposes • Send letters to the plan actuaries requesting confirmation that they are in good standing with their institute • Confirm with the actuaries that source data used was accurate and complete and was the same data used to prepare the actuarial valuation for the pension plans audited financial statements • Ensure that benefit costs are properly disclosed on the basis of the report of the Province of Ontario's actuary and the most recent audited financial statements of the pension plan • Engage an external actuary to review the three key 2015/16 economic assumptions to assess their reasonableness (e.g. discount rate, inflation and salary escalation) • Assess the accounting treatment and the amounts recorded related to the non-pension post-retirement benefits

Extract from 2. Audit Planning Report - June 30 (Final) (AB 2016-06-23)_NoTC2

Pensions and Employee Future Benefits	• Request OPCD obtain from MOF Pension Policy Branch a discussion paper that outlines the derivation of "Management's Best Estimates" used to prepare the actuarial valuations • Compare assumptions made by the Province to those used in prior years and to those used in each individual plan's financial statements. Evaluate the new discount rates and salary assumptions used by the province • Request a year over year analysis for analytical review purposes • Send letters to the plan actuaries requesting confirmation that they are in good standing with their institute • Confirm with the actuaries that source data used was accurate and complete and was the same data used to prepare the actuarial valuation for the pension plans audited financial statements • Ensure that benefit costs are properly disclosed on the basis of the report of the Province of Ontario's actuary and the most recent audited financial statements of the pension plan

	• Engage an external actuary to review the three key 2015/16 economic assumptions to assess their reasonableness (e.g. discount rate, inflation and salary escalation) • Assess the accounting treatment and the amounts recorded related to the non-pension post-retirement benefits • Assess the accounting of the accrued benefit asset • Review the Pension and Other Employee Future Benefits note disclosure