Privileged and Confidential Legal Advice
Prepared by Sean Kearney, Len Hatzis and Paul Kaufman
TBS Legal, Civil Law Division, MAG
September 26, 2016

1. What is the scope of independence exercised by the controller in the preparation of the public accounts?

Short Answer
The Provincial Controller/ADM of the Ontario Provincial Controller Division of Treasury Board Secretariat (Provincial Controller) has been delegated statutory authority to direct the preparation of the public accounts. This statutory authority has also been delegated to the Deputy Minister of Finance and the Secretary of Treasury Board, and this authority is also independently retained by the Minister of Finance and the President of Treasury Board. In practice, the Provincial Controller must ensure that the consolidated financial statements of the Province (which form part of the Public Accounts) are prepared in accordance with GAAP, and her approval is required in order for the Public Accounts, including the consolidated financial statements of the Province, to be finalized.

Analysis
The preparation of the public accounts is governed by subsection 1.0.26(1) of the Financial Administration Act (FAA), which provides as follows:

> **Preparation of Public Accounts**
> 1.0.26 (1) The Public Accounts for each fiscal year shall be prepared under the direction of the Minister of Finance and shall include,
>
> (a) the annual report of the Government of Ontario for the fiscal year;
>
> (b) the consolidated financial statements of the Province for the fiscal year;
>
> (c) the report of the Auditor General concerning his or her examination of the consolidated financial statements of the Province; and
>
> (d) subject to subsection (4), any other information that, under another Act of the Legislature, is required to be included in the Public Accounts.

While subsection 1.0.26(1) references the Minister of Finance, Orders in Council under the Executive Council Act (most recently, O.C. 223/2016) provide that the powers and duties of the Minister of Finance under subsection 1.0.26(1) are shared between the Minister of Finance and the President of the Treasury Board. Both Ministers have delegated the power to direct the preparation of the public accounts to their respective deputy ministers, and to the Provincial Controller. Pursuant to section 80 of the

Legislation Act, both Ministers retain the delegated power to direct the preparation of the public accounts despite the delegation mentioned above.

The Provincial Controller therefore exercises a statutory power in directing staff on the preparation of the public accounts. While the Provincial Controller is an employee of the Treasury Board Secretariat, the oversight of the preparation of the Public Accounts is not merely a function of her employment, and she acts independently when directing staff in this regard. It is worth noting that an essential component of the Public Accounts is the consolidated financial statements of the Province, which must, as a matter of practice, be prepared in accordance with generally accepted accounting principles (GAAP) for governments.

While it is always possible for either the Minister of Finance, President of Treasury Board or their respective deputies to issue directions to staff concerning the preparation of the Public Accounts that may conflict with the direction provided by the Provincial Controller, such directions would likely be of little practical effect as consolidated financial statements of the Province (which form an integral part of the Public Accounts and are required to be included in the Public Accounts under section 1.0.26(1) of the FAA) are accompanied by a 'Management Statement of Responsibility' confirming that the consolidated financial statements are prepared in compliance with applicable legislation and GAAP. This statement is necessarily signed by the Deputy Ministers of Finance and Treasury Board Secretariat, and by the Provincial Controller. Consequently, if the consolidated financial statements were ultimately prepared in a manner that the Provincial Controller felt was inconsistent with GAAP, then she would presumably not sign the Management Statement of Responsibility. As it is common practice in Ontario for the Provincial Controller to sign the Management Statement of Responsibility (and this seems to be reflective of general practice in connection with statements of responsibility for consolidated financial statements), the failure of the Provincial Controller to sign the statement would (a) potentially lead to significant concerns about the manner in which the Province's financial statements had been prepared, and (b) arguably allow for a legal challenge as to whether the Public Accounts contain all of the elements specifically required under subsection 1.0.26(1) of the FAA, as the financial statements arguably are not complete without a fully executed Management Statement of Responsibility. In addition, Ontario's Public Accounts typically contain an introduction signed by the Provincial Controller and the absence of such a statement would likely further call into question the manner in which the Public Accounts were prepared and the Provincial Controller's role in and acceptance of same.

Furthermore, the Provincial Controller has been specifically delegated the authority to direct the preparation of the Public Accounts precisely because she has accounting expertise that is necessary for their preparation in accordance with GAAP. If higher ranking government officials that share the power under the FAA to direct the preparation of the Public Accounts were to issue countervailing directions to staff that conflicted with the direction provided by the Provincial Controller, the directing official's directions would be open to question and/or criticism in light of their lack of requisite accounting expertise to substitute their own judgment on the application of GAAP over that of the Provincial Controller.

2. What role, if any, is played by the following individuals/entities in the preparation of public accounts and what is the scope of that role in terms of the overall preparation of the public accounts and the ability to direct the controller on any aspect of the preparation of the public accounts:

- Management, particularly the Secretary to the Treasury Board, the Deputy of Finance, and the Secretary of the Cabinet
- The Minister of Finance
- Treasury Board
- Cabinet

i. Management

The respective roles of the Secretary of the Treasury Board and Deputy Minister of Finance in directing the preparation of the Public Accounts has been discussed in the response to question 1 above. However, to summarize this role, both deputy ministers share delegated authority to direct the preparation of the Public Accounts with the Provincial Controller. It is also notable that the Management Statement of Responsibility that accompanies the consolidated financial statements in the Public Accounts reflects this sharing of responsibility, as it is signed by both Deputy Ministers and the Provincial Controller.

The Secretary of Cabinet plays no formal or statutory role in the preparation of the Public Accounts.

ii. Minister of Finance (and President of Treasury Board)

As noted in the response to question 1, the Minister of Finance and the President of Treasury Board share the retained statutory responsibility to direct the preparation of the Public Accounts.

Subsection 1.0.26 (5) of the FAA governs the submission of the Public Accounts to the Lieutenant Governor in Council (LGIC) and the subsequent tabling of the Public Accounts by the LGIC. While subsection 1.0.26(5) of the FAA refers to the Minister of Finance submitting the Public Accounts to the LGIC, this responsibility has been assigned exclusively to the President of Treasury Board pursuant to Orders in Council under the Executive Council Act.

iii. Treasury Board

Treasury Board has the power (subject to the approval of the LGIC) under subsection 1.0.10(1) of the FAA to make regulations that directly or indirectly impact the manner in which the Public Accounts are prepared. Notably, Treasury Board has the power to make regulations:

- respecting the accounting for, and the collection, management and administration of public money [note that BPS pension assets would not qualify as 'public money' under the FAA];
- respecting the accounting policies and practices of ministries, agencies and other Crown-controlled corporations;

- respecting the accounting policies and practices of other entities that are consolidated on the Province's books; and
- respecting the accounting policies and practices to be followed with respect to the preparation of the consolidated financial statements of the Province.

Of these powers, only the last one seems directly relevant to the present issue. The scope of this power is discussed further in the answer to question 4. Treasury Board has no other formal powers in connection with the preparation of the Public Accounts.

iv. Cabinet

Under subsection 1.0.26(5) of the FAA, the Public Accounts are submitted by the President of the Treasury Board to the LGIC (i.e. the Lieutenant Governor acting with the advice of Cabinet), with the LGIC subsequently being obligated to table the Public Accounts or make them public (if the Assembly is not in session) "when the Public Accounts are ready to be laid before the Assembly".

We know of no judicial consideration of what "when the Public Accounts are ready to be laid before the Assembly" means in this context. However, in light of the complexity of public sector accounting in an organization as large as the Province of Ontario, the fact that the FAA elsewhere provides the Minister of Finance and President of Treasury Board with the express power to direct the preparation of the Public Accounts, and the fact that the FAA does not give the LGIC any other power to determine accounting policy for the public sector on its own, it does not seem likely that the Legislature intended to provide Cabinet with the ability to rewrite the Public Accounts under subsection 1.0.26(5). Instead, the appropriate reading of Cabinet's power under subsection 1.0.26(5) seems to be that Cabinet and the Lieutenant Governor have a power of 'final approval' and an ability to withhold that approval if the Public Accounts seem incomplete or if there is reason to question that they have been prepared in accordance with applicable standards.

3. Can the Minister refuse to sign the Public Accounts and, if yes, what are the results of that refusal?

Assumption

We have assumed that, in this scenario, the Minister would refuse to sign the transmittal letter which formally submits the Public Accounts to the Lieutenant Governor in Council (\`LGIC\`) pursuant to the requirements in subsection 1.0.26(5) of the FAA. As such, the result is that the Minister would not be submitting the Public Accounts to the LGIC within the statutory time periods for doing so.

Short Answer

The Minister may refuse to sign the Public Accounts where extraordinary circumstances exist. The Minister\`s decision not to sign the Public Accounts may be challenged in the Assembly or in Court on the grounds that she failed to submit the Public Accounts as required under subsection 1.0.26(5) of the Financial Administration Act. The Minister is unlikely to face censure within the Assembly but there is a moderate to moderately high risk that the court would conclude that the present circumstances do not constitute extraordinary circumstances and, as such, the Minister`s refusal to sign the Public Accounts violated subsection 1.0.26(5) of the FAA.

Analysis

i) the Minister can refuse to sign the Public Accounts in extraordinary circumstances

Subsection 1.0.26(5) of the FAA 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)

Therefore, the Minister may refuse to sign the Public Accounts and, as such, refuse to submit the Public Accounts to the LGIC in extraordinary circumstances.

ii) The Minister`s refusal to sign the Public Accounts can be challenged

As previously set out, we have assumed that the Minister`s refusal to sign the Public Accounts means that the Minister would refuse to sign the letter that formally submits the Public Accounts to the LGIC. Except in extraordinary circumstances, the Minister is under a statutory obligation to submit the Public Accounts to the LGIC by the 180th day after the end of the fiscal year. Non-compliance with the statutory requirements for submitting the Public Accounts can be challenged. It is unlikely that the Minister would face formal censure from the Legislative Assembly for failing to table the Public Accounts in the timelines contemplated in the FAA.

Non-compliance with the FAA could be challenged in court by way of an application for judicial review. In the present circumstances, 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.

4. What is the scope of Cabinet's regulatory authority related to the preparation of public accounts? For example, can a regulation direct that the OTPP surplus be treated as an asset and stipulate the value of the asset?

Cabinet does not have independent regulation-making authority in connection with the preparation of the Public Accounts. Instead, section 1.0.10(1) of the FAA provides Treasury Board, subject to the approval of the LGIC, with the power to make regulations “respecting the accounting policies and practices to be followed with respect to the preparation of the consolidated financial statements of the Province” (under subsection 1.0.26(1) of the FAA, the consolidated financial statements of the Province form part of the Public Accounts).

This regulation-making power is limited to “policies and practices” to be followed in respect of the preparation of the province’s financial statements. This likely precludes prescribing in regulation a specific value that is to be recorded in connection with the OTTP pension asset, as that would involve prescribing the result of a particular accounting treatment rather than the policies and practices that lead to that result. However, Treasury Board could make a regulation that set out the accounting rule that would lead to the desired result. In so doing, it would be advisable (for the purposes of consistency and to support the validity of the regulation in response to a challenge by way of judicial review) to prescribe accounting policies and practices that treated the class of assets to which the OTTP pension surplus belongs in a consistent manner [i.e. to treat the other jointly sponsored pension plan to which the Province contributes, the OPSEU Pension Plan, in the same manner.]

There is no express limitation in section 1.0.10(1) of the FAA that requires that regulations prescribing accounting standards be in accordance with GAAP. However, subsection 1.0.25(2) of the FAA does provide the Minister of Finance with the power to compel pension plan administrators to provide "information required to calculate in accordance with generally accepted accounting principles the pension expense and liability set out in the Public Accounts." Since this provision refers to the calculation of pension *liabilities* in accordance with GAAP, it could inform a Court's consideration of the scope of the regulation-making authority in subsection 1.0.10 in connection with prescribing accounting policies and practices for pensions surpluses. If the Province was unable to demonstrate that such a regulation was arguably consistent with GAAP, then that factor would likely increase the risk that the regulation could be challenged by way of judicial review.

However, we note that in the present case there seems to be a genuine disagreement between the Province and the Auditor General as to what GAAP actually requires, with both parties able to point to external advice supporting their position. Therefore, a regulation prescribing either the Auditor General's view or the Province's view of the proper application of GAAP would have some objective support, and the Province could argue that such a regulation was intended to provide clarity on an uncertain issue, regardless of the specific accounting approach that is prescribed.