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PRIVILEGED AND CONFIDENTIAL

Mr. Len Hatzis
Deputy Director, Treasury Board Secretariat Legal Services
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Dear Sir:

Interpretation of *Auditor General Act*

You have requested our opinion regarding whether the Auditor-General of Ontario (the "Auditor General") is under a statutory obligation under the *Financial Administration Act* (Ontario) (the "FAA") and the *Auditor General Act* (Ontario) (the "AG Act") to audit the consolidated financial statements that form the basis for the public accounts of Ontario (the "Public Accounts") and to provide a report regarding this audit to the Government of Ontario (the "Government") prior to the deadline (the "Deadline") imposed under the FAA for the Government to table the Public Accounts before the Legislative Assembly (the "Assembly").

This opinion is requested by the Government in order to clarify the relationship between the Government's obligations under the FAA and the duties of the Auditor General under both the FAA and the AG Act.

Summary of Opinion

For the reasons set out below, it is our opinion that, although the matter is not free from doubt, the better view is that both the FAA and the AG Act require the Auditor-General to conduct the audit of the consolidated financial statements and provide the report, including her audit opinion, prior to the Deadline.

Privileged & Confidential

The FAA and the AG Act do not impose an express obligation on the Auditor-General to conduct the audit and provide her report prior to the Deadline. In our opinion, however, the wording of the applicable legislative provisions, interpreted in light of the statutory scheme as a whole, analogous case law and past administrative practice, provide the Government with a good argument that the Auditor-General is under an implied statutory duty to conduct the audit and provide the report, including her audit opinion, before the Deadline.

Scope of Review

In providing this opinion, we have reviewed:

- The FAA;
- The AG Act;
- Legislative history, such as Committee Reports;
- Samples of the Public Accounts; and
- Applicable legal authorities (case law and texts).

In addition, we have relied upon certain information provided in conversations with representatives of Government.

The consequences if the Auditor General is not complying with her statutory duties and the remedies or steps available to the Government in such circumstances are beyond the scope of this opinion.

Analysis

FAA Requirement to Table Public Accounts

Section 1.0.26(1) of the FAA provides that the Public Accounts for each fiscal year shall be prepared under the direction of the Minister of Finance and that the Public Accounts shall include, among other items, the consolidated financial statements of the Province for the fiscal year and the report of the Auditor General concerning his or her examination of the consolidated financial statements.[1]

[1] *Financial Administration Act*, R.S.O. 1990, c. F.12, as amended, s. 1.0.26(2)(b) and (c) [FAA].

The FAA requires the Government, except in extraordinary circumstances, to 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 (the Deadline). The Lieutenant Governor in Council is then required to lay the Public Accounts before the Assembly if the Assembly is in session or alternatively, to make them public and then lay them before the Assembly on or before the 10th day of the next session.[2]

As set out below, the terms of the FAA, the AG Act, analogous case law and past administrative practice support our opinion that the better view is that (a) the Auditor General owes an implied statutory duty under the FAA to audit the consolidated financial statements and provide her report prior to the Deadline; and (b) that the "report" that is required to be provided in accordance with the FAA must contain the Auditor General's audit opinion.

A. Obligation to Audit and Report Prior to the Deadline

i. Implied Duty under the FAA

Although section 1.0.26(1) of the FAA requires the Public Accounts to include the Auditor General's report concerning her examination of the consolidated financial statements, neither section 1.0.26(1) of the FAA nor any other provision of the FAA imposes an express obligation on the Auditor General to conduct the audit of the consolidated financial statements and provide her report prior to the Deadline. We have also found no case law interpreting section 1.0.26 of the FAA.

The applicable provision of the FAA is drafted in the passive voice ("The Public Accounts shall be prepared under the direction of the Minister of Finance... and shall include...the report of the Auditor General"). As a matter of statutory interpretation, the word "shall" is presumptively interpreted as imposing a mandatory obligation.[3]

In the absence of any statutory obligation under the FAA for the Minister of Finance to direct the preparation of the Public Accounts, it is our view that this language would likely be read as imposing a positive obligation on the Minister of Finance to direct the preparation of the Public Accounts.

Equally, in the absence of an express statutory obligation for the Auditor General to audit the consolidated financial statements and provide her report prior to the Deadline, it is our view that section 1.0.26(1) of the FAA would likely be read as imposing an implied obligation on the Auditor General to audit the consolidated financial statements and

2 FAA, s. 1.0.26(5).

3 *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 737.

provide the report regarding the examination of the consolidated financial statements before the Deadline. This implied obligation flows from the fact that the Public Accounts must include the Auditor General's report and the Government cannot table the Public Accounts without it.

It is our view that this implied duty arises not only from the purpose and wording of the FAA, but also by reference to the terms of the AG Act, which form part of the overall legislative scheme for ensuring that the Auditor General provides objective scrutiny of the Public Accounts.

ii. Obligations Under the AG Act

Section 9 of the AG Act imposes a statutory obligation on the Auditor General to audit, on behalf of the Assembly and in such manner as the Auditor General considers necessary, the accounts and records of the receipt and disbursement of public money forming part of the Consolidated Revenue Fund.[4] The Auditor General has further audit or audit oversight obligations in relation to an "agency of the Crown" that is not audited by another auditor,[5] Crown-controlled corporations,[6] and certain broader public sector institutions or organizations and other grant recipients.[7]

Although section 9 of the AG Act does not specifically mention the obligation to audit the Public Accounts, we understand that the Public Accounts subsume the audited financial information of the Government (including the Consolidated Revenue Fund) and the agencies and public sector bodies set out in sections 9. Section 9 is the primary section in the AG Act that imposes the duty on the Auditor General to perform the audit function for which the Auditor General is appointed. In our view, section 9 supports the position that the Auditor General is under a statutory obligation to audit the consolidated financial statements that will form the basis for the Public Accounts that must be tabled in accordance with the FAA.

Section 9 does not impose an express obligation on the Auditor General to conduct the audit by the Deadline or to provide a report regarding this audit. However, section 79 of the *Legislation Act* provides that "...duties that are imposed on a person shall be performed, whenever the occasion requires."[8] Although we have found no case law

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4 *Auditor General Act*, R.S.O. 1990, c. A.35, s. 9(1) [AG Act].

5 AG Act, s. 9(2). "Agency of the Crown" is defined in section 1 of the AG Act.

6 AG Act, s. 9(3).

7 AG Act, s. 9.1.

8 *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 79.

interpreting section 79, the wording of this provision supports the conclusion that the Auditor General's audit duties under section 9 should be interpreted as being required to be performed prior to the Deadline because this is required in order for the Government to comply with its obligations under the FAA to table the Public Accounts by the Deadline.

The Auditor General is required under section 12 of the AG Act to report annually to the Speaker of the Assembly. This annual report shall be made after each fiscal year is closed and after the Public Accounts are laid before the Assembly. The deadline for such report is no later than the 31st of December in each year, unless the Public Accounts are not laid before the Assembly by that day.[9] In the annual report, the Auditor General shall express his or her opinion as to whether the consolidated financial statements of Ontario, "as reported in the Public Accounts", present fairly information in accordance with appropriate generally accepted accounting principles and the Auditor General shall set out any reservations he or she may have.[10]

The wording of section 12 of the AG Act provides further support for the position that the FAA imposes an implied obligation on the Auditor General to audit the consolidated financial statements and provide a report prior to the Deadline. The requirements under both subsections 12(1) and (3) depend on the Public Accounts having been prepared and tabled in accordance with the FAA. The Auditor General's functions under these subsections cannot be performed in a scenario in which the Public Accounts have not been tabled because the Government's obligations under the FAA – including the requirement to include the Auditor General's report in the Public Accounts – cannot be satisfied.

In our view, therefore, interpreting the FAA as imposing an implied duty on the Auditor General to audit the consolidated financial statements and provide her report prior to the Deadline is consistent with the provisions and the scheme of the AG Act. The contrary interpretation would arguably allow the Auditor General to frustrate the scheme that the Legislature has implemented under the FAA and the AG Act to provide objective scrutiny of the Public Accounts.

iii. Applicable Case Law

Although we have found no case law interpreting either section 1.0.26 of the FAA or sections 9 and 12 of the AG Act, there is precedent in other cases for interpreting a statutory provision as imposing an implied duty on a statutory actor where the legislative

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9 AG Act, s. 12(1).

10 AG Act, s. 12(3).

scheme requires it. This case law, while not determinative when taken in isolation, provides general support for interpreting section 1.0.26 of the FAA as imposing an implied duty on the Auditor General to conduct her audit and provide a report before the Deadline.

For example, the Saskatchewan Court of Appeal has interpreted a statutory obligation to provide a claimant with a written decision to include an implied obligation to do so in a timely manner (i.e. sufficiently in advance of the expiry of a statutory appeal period). Such an implied obligation was held to arise from the scheme of the statute as a whole.[11] Similarly, under immigration law, an obligation by the Minister to process an application for refugee sponsorship has been held to include an implied duty to provide the necessary application to the potential immigrant.[12] Finally, child protection legislation has been interpreted to include an implied duty to investigate and present evidence to support a particular child placement.[13]

Moreover, although the Auditor General is not subject to an order of *mandamus*, it is instructive that, as a matter of administrative law, an order of *mandamus* – which compels a public official to perform a statutory duty – can be based on an implied duty.[14]

iv. Past Administrative Practice

Past administrative practice by the Auditor General, although not binding, can also be an aid to interpretation of a statutory scheme.[15] Administrative interpretation of a statute can be either express or implied.[16] The basis for accepting administrative practice as an aid to statutory interpretation is two-fold: (a) the administrator of a statute develops expertise

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11 *Saskatchewan Government Insurance v. Schmidt*, 2008 SKCA 167 at para. 22.

12 *Nguyen v. Canada (Minister of Employment & Immigration)*, 1993 CarswellNat 92 (F.C.A.) at paras. 28 and 34-36.

13 *Children's Aid Society of Algoma v. R.M.*, 2001 CarswellOnt 2204 (C.J.) at paras. 63 to 65.

14 Brown & Evans, *Judicial Review of Administrative Action in Canada*, Vol. 1 (Toronto: Thomson Reuters, 2016 (looseleaf)) at para. 1:3220.

15 *Harel v. Quebec (Deputy Minister of Revenue)*, [1978] 1 S.C.R. 851 at p. 859; *Will-Kare Paving & Contracting Ltd. v. Canada* (2000), 188 D.L.R. (4th) 242 (S.C.C.) at p. 267.

16 Cote, *The Interpretation of Legislation in Canada*, 3rd Edition (Scarborough: Thomson Canada Limited, 2000) at p. 547 [Cote]; *Sullivan on the Construction of Statutes*, 6th Ed (Markham: LexisNexis, 2014) at para. 23.118 [Sullivan].

and perspective by administering legislation on a day-to-day basis; and (b) consistent administrative interpretation creates legitimate expectations and reliance.[17]

In our view, the Auditor General would likely be viewed as the "administrator" of the scheme established by the Legislature to scrutinize Government spending. This scheme includes both the FAA and the AG Act. As such, the Auditor General's historic interpretation of the obligations imposed on her under the FAA and the AG Act would likely be given some weight in ascertaining the interpretation of the applicable provisions under both Acts.

It is our understanding that since at least 1999, the Auditor General has audited the consolidated financial statements and provided his or her report prior to the Government's deadline for tabling the Public Accounts, as that deadline was prescribed at the relevant time.

The Auditor General's website also describes the Auditor General's role in performing an "Attest Audit" of the Public Accounts. The website indicates that after the audit, the Auditor General expresses an opinion on the financial statements of the province. The opinion is then reproduced in both the Public Accounts of the province and in the Auditor General's annual report.[18] While not determinative from a legal perspective, these public statements arguably demonstrate the Auditor General's own view that she is required to conduct her audit and provide her opinion prior to the Deadline so that the opinion can be reflected in the Public Accounts.

B. Obligation to Provide Audit Opinion

We have considered whether the "report" that is required to be provided under the FAA is required to include the Auditor General's audit opinion.

Section 1.0.26(1) of the FAA provides that the Auditor General is required to provide "the report of the Auditor General concerning his or examination of the consolidated financial statements of the Province." There is no express reference in this provision to an audit opinion.

The language of the FAA can be contrasted with the wording of section 12(3) of the AG Act. Section 12(3) expressly provides that the Auditor General, in her annual report, shall "express his or her opinion" as to whether the consolidated financial statements present fairly information in accordance with appropriate generally accepted accounting

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17 Sullivan, above, at para. 23.111; Cote, above, at p. 549.

18 http://www.auditor.on.ca/en/content/aboutus/whatwedo.html: "The Kinds of Audits and What is Audited".

principles. Section 12(3) also contemplates that the Auditor General shall set out any reservations that he or she may have.

It could be argued that the explicit reference to the audit opinion in section 12(3), as contrasted with the reference to a "report" in section 1.0.26(1) of the FAA, means that the Auditor General is only required to provide her audit opinion in the annual report. Under section 12(1) of the AG Act, the annual report only has to be delivered after the Public Accounts have been tabled.

In our view, this is not the better interpretation of the FAA provisions. We have reviewed selected excerpts of the Canadian Auditing Standards (CAS), which indicate that an "auditor's report" is required to include the auditor's audit opinion.[19] Assuming that, as a matter of auditing standards, an audit necessarily entails an "auditor's report" and that an "auditor's report" is required to include the audit opinion, we believe the better view is that "report" in section 1.0.26(2) of the FAA would be interpreted to mean an auditor's report, including an audit opinion.

In our view, this interpretation is consistent with section 9 of the AG Act, which is the principal source of the obligation imposed on the Auditor General to "audit" the Public Accounts. Arguably, the Public Accounts have not been "audited" if the Auditor General has not expressed an audit opinion in respect of them.

Furthermore, the requirement to provide an audit opinion under the FAA prior to the Deadline for tabling the Public Accounts is consistent with the objectives of the FAA. If section 1.0.26(1) is interpreted as not requiring the Auditor General's report to include the audit opinion, the effect would be to require the Government to table the Public Accounts in an unaudited form. This appears contrary to the purpose for tabling the Public Accounts before the Assembly.

Finally, we understand that the Auditor General's own administrative practice – and the public statements on the Auditor General's website – indicate that the Auditor General's own view is that the audit opinion is required to be provided twice. It is required to be provided prior to the Deadline in order to include it with the Public Accounts and again in the annual report.

[19] Canadian Auditing Standards CAS 700: Forming an opinion and reporting on financial statements, paras. 20-45.

Although not free from doubt, therefore, it is our opinion that the better view is that section 1.0.26(1) of the FAA would be interpreted as requiring the Auditor General to provide a full auditor's report, including an audit opinion, prior to the Deadline.

Yours very truly,

Osler, Hoskin & Harcourt LLP.

Osler, Hoskin & Harcourt LLP
JC/JS: