

Officers of the Legislature in the Province of Ontario: Who, When, and Why¹

R.A. Sciarra, B.A. (Hons.)
Ontario Legislative Internship Programme
Room 1302 Whitney Block
Queen's Park
Toronto, Ontario
Canada
M7A 1A2

rebecca.sciarra@gmail.com

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Abstract

This paper addresses the topic of Officers of the Legislature in the Province of Ontario. Specifically, this paper explores the Office of the Auditor General in Ontario, as one of the oldest and most predominant of these offices. Further, this paper is a product of our OLIP ‘crash course’ regarding the Legislative Assembly of Ontario. In September 2004 we were formally introduced to and engaged by several officers of the Ontario legislature in a bid to fully understand the political institution which we would be serving for the next ten months.

This paper specifically examines the historical and most present system of mandate review conducted, regarding the Office of the Auditor General. Firstly, I chart out the ad-hoc, yet effective, mandate reviews, which were conducted for this office of the legislature in Ontario up until the late 1970s. Subsequently, I focus on the most recent adoption of amendments to the *Audit Act*, as they received Royal Assent in December 2004. Through a series of interviews with officials from the office in question and by reviewing Hansard Debates and Annual Reports published by the Auditor General’s Office, I offer an examination of the lengthy mandate review which was applied to this office. I question the process under which it unfolded and highlight the ineffective procedures currently in place to conduct a mandate review for officers of the legislature.

Ultimately, I suggest that how mandates are reviewed for officers of a legislature is a highly critical process and one which poses many institutional challenges. Further, I contextualize this process as an aspect of democratic institution building and transition and suggest that not only is it imperative for firmly developed democracies, in and of themselves, to conduct transparent and effective mandate reviews but it is highly critical to do as these bodies increasingly assume international consulting functions.

Traditionally, when looking at Ontario’s legislature, we conceptualize it as a structure, which is comprised of three over-lapping spheres: members of parliament, political parties, and committees. Together, these three dimensions function to “represent the people, hold government accountable, debate important issues, recruit and train political leaders, legitimize and build support for government policies.”¹ This conceptualization is relatively useful and adequate when analyzing legislatures. By looking to these three spheres, a wealth of procedures, processes, institutional mechanisms, and behaviours are unearthed. However, where is it that offices of the legislatures fit into this definition? I will explore this by specifically focusing upon one officer of Ontario’s legislature – the Office of the Provincial Auditor^{II}. I will examine what function this body, in general, performs within a democratic political system. I will then turn to the evolution of Ontario’s history of legislative auditing, how its domestic mandate has developed over time, and the role, which it plays on an international level.

Fiscal Watchdogs; Institutions of Democratic Political Systems?

When thinking about democratic governments, either at the municipal, provincial, or federal level or across different areas of the globe, variations and points of contrast abound. Electoral systems, divisions of powers, heads of governments, and demographic compositions of legislatures all vary to some extent. No one country is a replica of another. Formal tools such as constitutional frameworks in combination with cultural norms, immigration flows, historical pressure points, and social ‘values’ work together to

^{II} I will use the term, the Office of the Provincial Auditor throughout the paper, in place of the Office of the Auditor General, despite an official change in title of the office in December 2004.

produce systems of government which are unique and particular to the group of people that stand as the citizens that they are designed to serve. Although the variations between democratic governments are endless, a common feature or characteristic, and possibly the most important characteristic, can be applied to all democratic governments, across time and place. Democratic governments are the bodies, unto which control of the public purse is entrusted.

That the concept of government is completely wedded to the concept of taxation or raising funds is a fairly substantiated truth. Most simply, elected representatives and the governments that they constitute, spend money, raised through taxation, in order to serve the public. Roads are paved, schools are built, public transit systems exist, public parks have benches and garbage cans, traffic lights operate, and the list continues, because governments directly administer the release of public funds to maintain, sustain, or create services and programs used by the 'public'.

The implications of a government's fundamental role as the appropriator of public funds is best highlighted by the fact that regardless of a nation's age, economic wealth, literacy, ability to avert war and conflict, or apparent level of stability, a government has the capacity to fall because of envisioned spending schemes or because of a revealed mismanagement of public funds.² Even within nations that are considered to be stalwarts of political stability, governmental disarray abounds when attention turns to how a government plans to spend funds derived from the public purse or when a government is exposed to have inappropriately spent those funds. One only has to recall the unveiling of the 2003 Ontario budget at Magna International or look to the current paralysis rampant among the Centre Block in Ottawa to note the critical importance which government

spending, either as an intention or a performed act, occupies within a political system, parliament, legislature or society.

The flow of money from public to political center and vice versa is a complex system which has emblematic meaning as it is based upon normative principles of transparency and accountability. It has the capacity to reflect the quality of any given political regime. Too often, when trying to ‘measure’ the health of a democracy we look for indicators such as gross national products levels, literacy rates, mortality rates, and the extent to which individual, collective and human rights are protected.³ Seldomly do we focus upon the sphere of fiscal spending and the level of fiscal accountability contained within a political regime when attempting to posit an evaluative analysis on any given government’s ‘worth’, health, or extent to which it is democratic.

History of Legislative Auditing and the Office of the Provincial Auditor in Ontario

The Province of Ontario has had a long tradition of attempting to effect responsible governance, through the establishment of fiscal transparency and accountability. At its most nascent stage, the Province of Ontario supported these principles by cultivating the development of a legislative auditing regime. Towards the end of the 19th century, although the province of Ontario was a miniscule relation of its large cousin in Ottawa, in terms of its annual budget and expenditures, there still appeared a need to work towards a higher degree of accountability in the area of fiscal spending.⁴ Largely a product of the disillusioned future Premier of Ontario Edward Blake, 1869 marked the birth of the legislative audit in the Province of Ontario.

Edward Blake became Ontario's first Liberal Premier in 1871, following his spearheading of enhanced governmental accountability and transparency as a backbencher. Before confederation, Blake had observed what most would term as the most clear cut instance of tyranny and abjection of democratic principles. Nearly half a million dollars was spent over the span of six years during the 1850s without the consent of Parliament.⁵ As a result, Blake was motivated to call for the establishment of an independent legislative auditor, to act simply as a check on government spending.

Today, we have become accustomed to notions of governmental or parliamentary 'watchdogs', who by virtue of being independent of elected bodies are entrusted to prevent or minimize the potential for abuses of power or authority. Currently, these 'watchdog' bodies have become known as officers of the legislature and include a number of different mandates and figure heads. The term 'officers of the legislature' can lead to ambiguity and refer to administrative personnel within a legislature such as clerks, speakers, committee clerks, Hansard services, and library services.⁶ However, for the purposes of this paper, I will employ this term as defined by Paul Thomas in his article entitled, "Past, Present and Future of Officers of Parliament".

Thomas defines these officers, across both federal and provincial jurisdictions, as independent from the executive level of government and who exist to serve parliament, and ostensibly the public. Officers of the legislature can be considered tools of parliament, which are used to execute scrutiny and demand accountability of the executive.⁷ By this definition, the Province of Ontario can be said to have six officers of the legislature: The Environmental Commissioner, The Chief Electoral Officer, The Integrity and Lobbyist Commissioner, The Information and Privacy Officer, The

Ombudsman, and The Provincial Auditor. The first five of these ‘watchdog’ officers are largely recent phenomenon of the last forty years. Where holding the government accountable in regards to environmental rights, ethical standards, privacy rights, and human rights have become relatively recent priorities, there has been a long-standing investment in Ontario for ensuring that government is held accountable for its monetary spending.

New Sub-Heading

The first session of the sixth parliament in Ontario marked the official birth of Ontario’s first officer of the legislature, with the introduction of the *Audit Act*, 1886. Edward Blake’s warnings and predictions regarding the potential for fiscal mismanagement among the executive and within the public service materialized when a discrepancy of \$14,680 was highlighted in the Treasury Department’s financial books in 1885. An external investigation was conducted and resulted in the unearthing of critical trends. The then auditor, Charles Hood Sproule had noted the discrepancy and had reported it to the Treasurer of the time but had made no statement to the legislature as he had no authority to do so. Additionally, the investigation of the fiscal discrepancy revealed that fraudulent activity had occurred. This investigation concluded that fiscal mismanagement, inability for the Auditor in the Treasury Department to effectively communicate fiscal discrepancies, and the pervasiveness of fraudulent activity was “...largely the result of the absence of thorough checks made by the officials of the Treasury Department.”⁸

The introduction of the *Audit Act* in 1886 envisioned a Provincial Auditor as part watchdog body; part in house expert on ‘good’ financial management. The ‘watchdog’ function was indicated by removal from executive control; the Provincial Auditor and all his or her staff would be appointed by the Lieutenant Governor. Further, the Provincial Auditor was also vested with the authority to examine any person on oath in connection with any account audited and to report all public accounts and expenditures to the Legislative Assembly.⁹

The 1886 Act saw the Provincial Auditor become the co-signer of all moneys spent by the Treasury and was entrusted to not allow over expenditures, except in certain cases. This marrying of the Provincial Auditor with the Treasurer and the awarding of decision-making authority regarding expenditures to the Auditor produced a legislative auditing function, which was somewhat dysfunctional. Cases arose where there was disagreement between the Auditor and the Treasurer regarding expenditures, and therefore a rank-order of authority was established between the two. In cases where the Auditor expressed objection to the issuing of a cheque or an over expenditure, the matter was internally reviewed by a creature of the Treasury Department, the Treasury Board.¹⁰

New Sub-Heading

The mandate and organizational structure of legislative auditing in Ontario, as practiced through the Office of the Provincial Auditor, which we know today is quite different from the provisions outlined in the original *Audit Act* of 1886. Today, the Office of the Provincial Auditor’s mission is “to report to the legislative assembly objective information and recommendations resulting from independent audits of the government’s

program, its Crown agencies, and corporation.”¹¹ The Auditor is technically appointed by the Lieutenant Governor, on advice from an all-party legislative committee. The Auditor and all staff are independent of government and its administration and are enshrined with the right to access all relevant information and records necessary to the performance of their duties. Most simply, the chief mandate of the office is to “assist the legislative assembly in holding the government and its administrators accountable for the quality of the administration’s stewardship of public funds and for the achievement of value for money in government operations.” (2000 report, chapter 2) This function of providing elected representatives with thorough-going and objective information to use to assess the extent to which government, or the executive, has been fiscally responsible has been, up until recently, executed through three types of audits. The Office examines the receipt and disbursement of public money, the financial statements of the province and agencies of the crown, and examines the administration of government programs carried out by ministries and agencies.¹²

This mandate and the feature of the office as an independent body are a result of several amendments made to the *Audit Act*. There can be considered three pivotal amendments made which were the precursors for the office operating in the manner, which it does today. The removal of the provincial auditor from the authority of the Treasury Department in the 1950s, a phasing out of the auditor’s office performing pre-*Audit Activities* and conducting post-audits of government expenditures in the 1960s, and the entrenchment in the 1970s of the provincial auditor conducting value-for money audits were significant legislative changes made to the mandate of the office. All three of these consequential changes were the product of a number of forces – such as provincial

auditors of the day, various Treasurers, and individuals MPPs - working together to alter the function of this legislative institution.

The separation of the provincial auditor from the Treasury Department was spurred by the Public Accounts Committee (PAC) in March 1949. In particular, an opposition member of PAC, the Liberal MPP for Waterloo North, Mr. Brown, clearly criticized the incestuous relationship between the Treasurer and the provincial auditor and how this compromised the “explicit duty”¹³ of the office. As a result of discussions led by Mr. Brown in PAC, the committee passed a motion recommending that the Act be amended in order to effect greater fiscal accountability. By March 1950, the bill to amend the *Audit Act* passed second reading. The amendment to the *Audit Act* reflected the spirit of the discussions in the PAC, as Mr. Brown commented after the act received royal assent, “The strength of the entire Act is summed up in section 25 of the Act, outlining the annual report of the auditor, to whom he must report and on what he must report.”¹⁴

The next significant change to the scope of legislative audit in Ontario was realized through a shift from the office performing pre-audits of government expenditures to post-audit expenditures. How this change was enacted varied somewhat from the previous process through which amendments to the *Audit Act* were made in the 1950s. The pre to post audit amendments took substantially longer to be adopted by government.

The pre audit function of legislative auditing entailed the auditor examining government expenditures before they were actually spent. The perspective latent in this process was that if money to be spent by government were reviewed before hand the chances of reducing theft, fraud, and mismanagement would be increased. One employee of the auditor’s office succinctly captures this function with, “... [the] treasury had to get

our blessing to pass payments. We could hold it up if we felt there was legitimate reason... We really ran a pre-control operation.”¹⁵

As early as the mid 1950s, the real-world application of pre-audit practices became harder as budget sizes and expenditures grew. As the province of Ontario boomed in the 1950s, spheres of provincial responsibility began to supercede those controlled by Ottawa, and the size and scope of government dramatically increased. As a result, conducting pre-audits were identified as practically impossible by the then provincial auditor. The Auditor’s Annual Report in 1965-57, called attention to the fact that not only were pre-audits logistically unfeasible, they were also ill-suited to sufficiently act as a control and review mechanism on government expenditures.¹⁶ The sheer volume of transactions made by government combined with the monetary size of these transactions made the performance of pre-audit functions a deficient tool of legislative auditing.

Despite acknowledgement by the provincial auditor in the 1950s regarding the inevitable paralysis of legislative auditing if it continued to perform only pre-audits, a response by government was not heard until the 1970s. It was only when the legislative committee on Government Productivity began looking at the *Audit Act* in 1970 that the warnings effaced in the early 1950s found their way through the legislative process.

In 1971, first reading of the bill to amend the *Audit Act* reflected the instrumental role, which the Committee on Government Productivity played in enacting amendment to the *Audit Act*.¹⁷ New amendments to the *Audit Act* established that legislative auditing would be performed through the conducting of post-audit activities, rather than pre-audit activities. The committee reasoned that in addition to pre-audits becoming a virtual

impossibility with the sheer size of government spending, the act of the auditor establishing how money would be spent, before it actually was, in fact compromised its role as a servant of parliament. The committee argued that to maintain a system of legislative auditing, where the auditor advised the executive on how to spend money, in fact perverted the motives of government and made legislative auditing a tool used by the executive rather than as an accountability tool designed to keep the executive in check.

The 1971 amendments started the phasing in of post-audits by the provincial auditor and shifted the task of pre-auditing to individual government departments and ministries. By awarding the auditor with the means to conduct post-audits, placing the task of pre-audits within government departments was not an ominous prospect. With reporting procedures firmly established and the auditor now able to look at all government expenditures, after the fact, the theory was that government departments would have a self-interest to pre-audit wisely and appropriately as a glass window would now be surrounding all of these spending activities.

As the post-auditing function of the provincial auditor's office was phased in through the 1970s, the office's significance to both the public and Official Opposition grew. Most specifically, the 1971 amendments contained the stuff of an opposition party's dreams. That a financial watchdog on government had been finally and clearly established with the introduction of post-auditing, members of the opposition became clearly invested in the act of legislative auditing. A government comes crashing quickly when fiscal mismanagement is communicated the public. The widening of the auditor's mandate in combination with the birth of media, as a tool of politicians, and the longevity of the Progressive Conservatives in Ontario, perhaps resulted in a significant perspective

put forth by the official opposition in regards to legislative auditing. In particular, in the early 1970s, members of PAC who were members of the official opposition began to stress the need for every measure to be taken to ensure that now the auditor had the power to rule on government's fiscal management, it was in fact an entity responsible solely to parliament and therefore the citizenry and was not under the thumb of the treasury. Recommendations from PAC and the leader of the official opposition in the early 1970s led to the adoption of value-for-money audits when amendment to the *Audit Act* were introduced in 1978. A report issued by the committee to the legislature in 1975 called for the initiation of value-for-money audits.¹⁸

The 1978 amendments were, up until October 2004; the most recent revisions made to the mandate and structure of the provincial auditor's office in Ontario and to the implications of legislative auditing as a tool designed to serve parliament. As a result of the 1978 amendments, the provincial auditor not only acted as a source of information for how and where public moneys were being spent but also provided an evaluative judgment on government expenditures. The auditor was now empowered to comment upon the effectiveness of government programs, examine the financial statements of recipients of provincial transfer payments, and to audit agencies of the crown and crown controlled corporations.¹⁹

Up until 1978, the legislation defining the mandate of the provincial auditor in Ontario and the scope of legislative auditing was a work in progress that was prodded along by the work and authority of legislative committees; with the PAC being the most influential. When provincial governments grew to be very relevant and big spending machines in the 1950s, the scope of legislative auditing was revised to both reflect and

respond to these changes. The birth of agencies of the crown and crown controlled corporations, the provision of provincial transfer payments, and increases in governmental programming demanded that the legislative auditing regime be made more congruent with the behaviour and evolution of government.

Amendments can be viewed as logistically inevitable as well as normatively necessary to accommodate the size and spending power of provincial governments. We might even go far to say that amendments to and expansions of legislative auditing occur in tandem with the growth of governments and by an extension can be a measure of institutional adaptability and procedural functionality as legislative mechanisms, such as legislative committees have been traditionally instrumental in the process of enacting this process.

If we turn back to one year ago, the scope of legislative auditing in Ontario mirrored that of the 1978 amendments. No new legislation had been introduced nor enacted since the late 1970s. A vacuous analysis could suggest that a legislative auditing mandate, which does not deviate or evolve across two decades reflects a consistent pattern of governmental spending. Clearly though, even the most lay political observer would suggest that government spending is not the same today, as it was in the late 1970s. Amendments to the *Audit Act* have now, just recently, been enacted and have significantly again altered the scope and strength of legislative auditing in Ontario. How is the close to twenty-five year gap in the introduction of new legislation accounted for? My purpose is not to postulate as to why new amendments to the *Audit Act* were introduced with the opening of the 38th parliament in Ontario. The political posturing that is quite possibly implicit in revision to the mandate of the provincial auditor is beyond

the scope of this paper. Rather, the more important question to put forth asks how were these amendments incorporated into the legislative agenda.

New Sub-Heading:

The process through which mandates of officers of the legislature are established inform not only the function of the office in question but also inform the nature of the executive level of government and the parliament itself, as officers of the legislature are broadly put, instruments of individual legislators to be used to counteract or neutralize or reduce the supremacy of the executive.²⁰ How mandates of these offices are established and revised is critical because the functional scope of any given office directly determines its level of efficacy to be used as a tool by parliament.

As already illustrated, the process of reviewing legislation guiding the mandate of the Provincial Auditor in Ontario has been an ad-hoc process. Formalized, periodic reviews have not occurred throughout the history of the province. Rather, the three major amendments outlined above established a consistent, although informal, pattern of various legislative committees bringing proposals for amendments to the legislative arena. Why legislative committees, particularly the PAC became the initiators of legislative review and the adoption of amendments is not clear. Committee members may have been motivated by a commitment to accountability frameworks, on an ethical basis. Similarly though, committee members may have initiated legislative review in the name of opposition tactics towards the government. Committee members could have been simply motivated to support legislative reviews of the *Audit Act* and put forth amendments in the name of institutional functionality as government physically and

fiscally grew in size over the latter half of the 20th century. Ultimately though, regardless of motivation among PAC members, once recommendations were put forth and found themselves into the legislative arena, they traveled a relatively clear and transparent route to becoming acts of parliament.

In Paul Thomas' review of officers of the legislature, he suggests that the optimal or ideal system of mandate review is obtained through the inclusion, in the statutes which created the various officers of the legislature, of a requirement for periodic reviews whereby Parliament is required to participate in the process. He suggests that committing to a fixed review date, of at least every five or ten years, would ensure that these office's mandates remain relevant and that with a parliamentary led review, the mandates would inherently be biased towards enacting accountability and scrutiny against the executive.²¹ It is with this reference of mandate review in mind that I will turn to the process through which, the mandate of legislative auditing in Ontario was recently expanded.

New Sub-Heading:

On November 30, 2004, a new mandate was established for the Office of the Provincial Auditor, as Bill 18, the *Audit Statute Amendment Act, 2004* received royal assent. At first blush, a mandate review, adoption of legislative amendments and a parliamentary consent to expand the powers entrusted to the Provincial Auditor in Ontario, appear to have occurred quickly and smoothly. A mere two months after the 2003 General Election, the then Minister of Finance, the Honourable Gregory Sorbara, introduced Bill 18. Between April and November 2004, amendments to the *Audit Act* were debated thoroughly by a number of members of the 38th parliament in Ontario and

resulted in the ordering of this bill to the Standing Committee on the Legislative Assembly. Just over two weeks later, Bill 18 was discharged from committee and came before the house. On November 22, 2004, the Minister of Finance moved third reading of the bill and members of the 38th parliament of the Ontario legislature cast their votes. Upon a tallying of the votes, the Clerk of the House announced, “the ayes are 73; the nays are 0.”²² With consent from the house, amendments to the *Audit Act* were adopted and the scope of legislative auditing in Ontario was expanded. This act of parliament ensured that this officer of the legislature remained an effective servant to the House and did not descend into a state of arrested development.

Most broadly, the passing of the *Audit Statute Law Amendment Act 2004*, saw the Provincial Auditor of Ontario become the Auditor General of Ontario. It also marked the adoption of an expanded scope of legislative auditing which suggested that in order for parliament to have a clear and accurate sense of how the government is spending tax payer dollars, the mandate of legislative auditing must include value-for-money audits of grant recipients. When the *Audit Statute Law Amendment Act, 2004t* received Royal Assent, a substantial amount of media commentary abounded. One newspaper article in particular encapsulated the main provisions included in the amendments with its headline of “Ontario’s auditor gets new title, more clout; Can investigate colleges, hospitals, crown companies; All three parties approve changes in unanimous vote.”²³ Similarly, in a meeting I had with the Acting Provincial Auditor, Jim McCarter, in September 2004, the fundamental shift in mandate scope was explained as including an “expansion of value-for money auditing to organizations in the broader public sector, such as hospitals, colleges, universities and school boards and any other organization meeting the definition

of grant recipient. Expanded mandate does not apply in the case of municipalities.”²⁴

Further, the Acting Provincial Auditor also explained that when Bill 18 received Royal Assent, it would also include an “expansion of value-for-money auditing to electricity sector corporations and other Crown controlled corporations.”²⁵

As these amendments have now passed into law and became effective in April 1, 2005, the adaptation of the legislative auditing mandate in Ontario appears to be healthy. In the same meeting with Jim McCarter, he explained that “the Liberals had indicated in their recent election platform that it supported expanding the mandate of the Provincial Auditor to enable the auditor to conduct value-for-money audits of organization in the broader public sector which received government grants. [And that on] December 9, 2003 the Minister of Finance tabled Bill 18, ‘to make the entire public sector more accountable to the people of Ontario.’”²⁶ 80% of the operating spending of the government of Ontario goes to spending partners, that being components of the MUSH sector (municipalities, universities, school boards, and hospitals). That the provincial government of Ontario, with all party support, endorsed legislative amendments to allow an investigation of these sectors, is a positive indicator of ensuring fiscal accountability and a system of check and balances on the executive level of government. Allowing the provincial auditor to report on transfer payments to grant recipients and to comment upon the economy and efficiency of how tax payer dollars are spent and managed in these sectors is certainly progressive. As a result, Ontario’s officer of parliament responsible for executing fiscal accountability, Ontario’s political institutions, and Ontario’s legislators emerge as ‘actors’ who are effective, adaptable, and committed to

governmental accountability and transparency. Is this conclusion necessarily valid, though?

New Sub-Heading:

With the adoption of these amendments and what appeared to be an efficient and transparent process of mandate review and policy making, I wanted to more thoroughly examine how these amendments were adopted and devised. Did the Public Accounts Committee pass a motion, which led to the government introducing a bill including amendments to the *Audit Act*? Did the provincial auditor act as an advocate for the adoption of new amendments? I conducted interviews with the previous Provincial Auditor, Erik Peters, and senior staff members from the provincial auditor's office to detail the process of mandate review and to ask if their mandate review was conducted in a timely, efficient, and responsive manner. Secondly, I also consulted Annual Reports published by the Provincial Auditor's office between 1990 and 2004. Lastly, I employed Hansard Debates from 1996 through to 2004 to conceptualize how the legislative arena responded to possible mandate reviews.

The amendments to the *Audit Act*, which received royal assent in November 2004, diverged from the pattern of mandate review, which had been previously established regarding the Office of the Provincial Auditor and the scope of legislative auditing in Ontario. Proposals for legislative auditing to shift from a system of pre-audits to post-audits were advocated, then adopted, and passed into law in the course of two years. Similarly, the incorporation of value-for-money auditing, although slow in comparison to other Canadian jurisdictions, was endorsed by the then provincial auditor and PAC

members. In turn, it was quickly reflected in legislation that appeared in the House and smoothly made it through the legislative process. In contrast, the amendments that widened the provincial auditor's mandate to allow the office to conduct value-for-money audits in the MUSH sector had been close to fifteen years in the making.

As early as 1989, amendments to the *Audit Act*, of the nature that were introduced with Bill 18 in November 2004, were discussed as part of public hearings held by the Standing Committee on Public Accounts. The then provincial auditor, Douglas Archer, had suggested at these hearing that there needed to be an evolution of how legislative auditing was conducted in regards to grant recipients.²⁷ At this time, the provincial auditor's office was only permitted to conduct an examination of accounting records of provincial grant recipients. Simply put, the provincial auditor's office was only allowed to list the various places, organizations, and bodies that received government dollars and to specify the amounts transferred and received. It was fairly clear to the provincial auditor's office at this time that a high percentage of provincial dollars were being transferred to agencies, as opposed to ministries. Consequently, there was a view that suggested there was a certain level of inanity inherent in the Provincial Auditor's office acting as an authority on the fiscal accountability of the province. Without being able to conduct value-for-money audits in the agencies that received a good portion of the provincial budget, the provincial auditor's office highlighted in the PAC hearings that their ability to provide accurate and useful information to members of the legislature regarding the fiscal responsibility of the government, was severely impaired. As a result, in 1990 the Standing Committee on Public Accounts supported this principle and was of the opinion that all provincial government agencies and all transfer payments recipients

should be subject to value for money audits by the Office of the Provincial Auditor, in an effort to enhance accountability.²⁸

In 1990, following the Committee's report to the legislature and their recommendation that proposed amendments to the *Audit Act* be drafted and introduced for First Reading as soon as possible, Douglas Archer, the then Provincial Auditor, submitted his draft of the legislation to the Minister of Economics. Whereas previous submissions made to the Minister responsible for the *Audit Act* had resulted in the immediate introduction of legislation in periods of mandate review; this submission resulted in a series of ministerial consultations. Between 1991 and 1992, the government of the day explained that before legislation that had been drafted by the then Provincial Auditor could be introduced, a series of consultations needed to be conducted with all of the parties that would be effected by the proposed amendments; namely the major transfer payment partners.²⁹

As government consultations continued during the period of appointing a new Provincial Auditor, the arrival of a new figure head for this office of the legislature continued to push for a substantial mandate review of the office. As Erik Peters commented in an interview,

“when I came aboard [in 1993] we were already agitating [for a mandate review and amendments to the *Audit Act*]. I held this view because I felt that we should not be auditing into a vacuum and that was what was exactly happening, so long as transfer payment agencies were not subject to value-for-money audits. The point was that, about half of government spending was not done by ministries and we therefore didn't have access to look at if those funds were being spent prudently.”³⁰

The appointment of Erik Peters as Provincial Auditor in 1993 saw an endorsement for the same amendments suggested in 1990. Taking into consideration that the expansion of a

workable legislative auditing mandate was not only a matter of enacting it by statute, Peters recommended that clear management responsibilities and accountability frameworks be established for the transfer payment agencies. The Standing Committee on Public Accounts subsequently unanimously passed a motion in June 1993 giving approval in principle to the Provincial Auditor to pursue the establishment of a workable legislated accountability framework with central agencies before any amendments were made to the *Audit Act*.³¹

With this motion, the next period of mandate review was comprised of consultation and collaboration between the then Provincial Auditor and senior officials stationed in the various transfer payment agencies, which would be effected by amendments made to the act. With collaboration occurring only between senior bureaucrats, with a personal stake in their organization, and the Provincial Auditor and therefore the absence of any mediating actor, such as the Minister of Finance, the consultations produced very little output.³² It became clear that senior officials within the central agencies did not agree on the need for a legislated accountability framework. Ultimately, it appeared that developing a widened mandate alongside the partners most effected was not possible at this time. Therefore, the provincial auditor returned to steering the mandate review and expansion through legislative channels and actors. Mr. Peters wrote a letter to the Standing Committee on Public Accounts and requested that the committee recommend to the Minister of Finance that an “amendment be made to the *Audit Act* which would provide the Provincial Auditor with the discretionary authority to audit a recipient of a government grant on a basis consistent with the full scope of the *Audit Act*.”³³ The committee agreed and recommended that public hearing be held. The

then Minister of Finance supported public hearings to be held to discuss amendments to the *Audit Act*. As of 1994, the status of amendments to the *Audit Act* exactly mirrored the status achieved in 1990.

Following the 1995 election, public hearings were held where all major transfer payment partners and other interested organization were invited to meet and discuss the proposed amendment to the *Audit Act* or to, alternatively, make suggestions for other ways to improve grant recipient accountability to the government and to the Legislative Assembly.³⁴ Upon conclusion of the public hearings in June 1996, the Provincial Auditor submitted draft proposals for amending the *Audit Act* to the Standing Committee on Public Accounts. The committee endorsed the proposals and adopted a motion that stated that the “Committee requests a response and action plan from the Minister of Finance by the Committee’s first meeting following the summer recess.”³⁵ The then Minister of Finance, Ernie Eves, returned a supportive but cautionary response by the suggested date. He wrote that the proposals “represent a significant step towards the fundamental reform of the public sector accountability system and I agree with the principles upon which it is based.”³⁶ Ultimately though, the Minister of Finance responded that despite his agreement with the principles underlying the proposed amendments, the entrenchment of the office’s mandate review would have to follow a public policy initiative being led by the government regarding restructuring of transfer payments to the province, otherwise known as the ‘Who Does What’ implementation during the first mandate of the Mike Harris government.³⁷

The Minister of Finance and the Provincial Auditor finally began to communicate directly following receipt of the Minister’s response to the PAC. Having experienced a

regressive round of consultations with senior bureaucrats between 1994 and 1996 and then repeatedly witnessing the submission of recommendations and motion put forth by the PAC that initiated non-committal responses, the mandate review and expansion process moved to be a process reminiscent of past times in Ontario's legislative auditing history. On October 2, 1996, the Minister responsible for the *Audit Act*, the Minister of Finance, met with Erik Peters, the then Provincial Auditor, to discuss the nature of the proposed amendments. Erik Peters commented in an interview regarding the actors required to conduct a mandate review of the office, that "my view had always been that if we were going to be dealing with amendments to the *Audit Act*, we should deal directly with the Minister and not through the bureaucracy."³⁸ Subsequently, it would seem that the time would have been right for the legislative auditing mandate to be expanded.

The meeting between the Minister and the Provincial Auditor concluded with an endorsement of the principles underlying the proposed amendments. However, the Minister of Finance still reasoned that it was best to await the outcome of the transfer payment restructuring exercise that his government had initiated. It was suggested that by 1997, the outcomes would be fully realized and the government could then turn attention to introducing complimentary amendments to the *Audit Act*. Throughout 1998 and 1999, Erik Peters continued to urge the government to consider implementing the proposed amendments to the *Audit Act*, however to no avail.³⁹ Each year, the Auditor's Annual Reports outlined the lack luster status of amendments to the *Audit Act*. In 2000, Erik Peters wrote another letter to then Minister of Finance, Jim Flaherty. The Minister replied that the ministry was still examining the full range of accountability issues, of which the proposed changes to the *Audit Act* form a part.⁴⁰ Following this unhelpful response, the

provincial auditor continued to lobby for a meaningful mandate review and turned strategies back towards working through the Public Accounts Committee.

Examination of the Provincial Auditor's Annual Reports embarrassingly illustrate the repeated efforts of the provincial auditor to initiate a mandate review and the consistency of the proposed amendments, as well as the non-response of government. The 2001 Annual Report noted that the government announced in its Speech from the Throne on April 19, 2001, that it would be introducing sweeping reforms to ensure that all public sector institutions are accountable to the citizens of Ontario and "in the planned reforms was a commitment to make amendments to the *Audit Act*."⁴¹ Assuming that commitments expressed or promises made in the legislature are unretractable, the Provincial Auditor commented that the office was "very pleased" with this announcement in the Throne Speech, as it would "help achieve greater accountability for the expenditure of public funds in the broader public sector."⁴² Disappointingly enough, the 2002 Annual Report explained that despite references to public sector accountability in the 2001 throne speech, "inconclusive discussions on a comprehensive set of amendments took place during the summer and fall of 2001 between the Provincial Auditor's office and the then Minister of Finance."⁴³ The 2003 Annual Report offers, by far, the most unsettling recounting of Ontario's institutional adaptability and the legislature's regard for fiscal accountability. The 2003 Annual Report reiterated that amendments have been proposed since 1989 without substantial response or support from government.⁴⁴ Further, the Provincial Auditor also references a letter that had been submitted to the Premier of Ontario in April 2003 in the name of pursuing amendments to the *Audit Act*. The 2003 Annual Report, states that no response from the Premier was ever received, but

“nevertheless, and in spite of the repeated setbacks we have experienced over the years in our efforts to have the *Audit Act* amended, the Office remains committed to pursuing amendments to the Act so that we may better serve the Legislative Assembly.”⁴⁵

To conclude Ontario’s process of review of the legislative auditing mandate review was a product of a paralyzed Public Account’s Committee or an unresponsive executive tier of government, as represented by the Premier and the Minister of Finance, is not entirely accurate. To reduce in action to only these agents of the political process, implicitly suggests that if legislators themselves had been included in the review process, they would have been motivated by wanting to ensure that the executive is held accountable and responsible for its spending of fiscal dollars. However, in this specific case, where the fiscal accountability check is not entirely applied to Minister’s of the Crown, but to agencies and professions within the broader public sector, the theory that your average backbencher will be compelled to act in favour of expanding the legislative auditing mandate falls through. Further, to assume that individual parliamentarians will support either more rigorous checks on the executive or in this case, grant recipients, is to negate the effect of party discipline, partisan politics, or the increasingly hostile divide between opposition and government in Ontario’s legislature.

Throughout the course of a quasi mandate review of the Office of the Provincial Auditor between 1989 and 2003, the legislature itself also grappled with a mandate review. Between 1996 and 2001, a number of Private Members’ Bills were introduced which almost perfectly encapsulated the recommendations that were flowing back and forth between the Provincial Auditor of the day, PACs, and the Ministry of Finance during the same time. In November 1996, the PC member Bart Maves introduced Bill 89,

The Accountability Improvement Act. Bill 89 ironically mirrors the explanatory note contained in Bill 18, *The Audit Statute Law Amendment Law*, as it explains that it “amends the *Audit Act* to improve the accountability of hospitals, school boards, universities, colleges, municipalities and other organizations which receive payments from the governments.”⁴⁶ This bill was eventually referred to the Legislative Committee on General Government and then ‘died’ when the house prorogued.

Reviewing the Hansard record of the Second Reading debates of Bill 89 illustrates a broad agreement in principle of the tenets expressed in the bill, with the exception of the NDP member from Nickel Belt. However, despite agreement in principle regarding high accountability, the main opposition to the Bill revolved around opposition to and suspicion of government policy. Members from the Official Opposition of the day, the Liberal Party of Ontario, and the NDP member who participated in the Second Reading debate agreed in principle but ultimately disagreed with the party, on a broader level, who had been responsible for introducing the bill. The member from Cochrane South concluded his statement with “I think that value for money audits, although they sound like a good idea, have some dangerous repercussion if the results are taken by political opportunists of the right wing to expose how badly the government is spending money in a particular areas where they may not be the case.”⁴⁷ Similarly, the member from Yorkview also reduced his perspectives on the bill to a commentary on the methods of policy making adopted by the government as he concluded his remarks with “I think that what the government is trying to do with the introduction of bill such as this one here is that for the next couple of years or so they will be trying very desperately to undo what they have been doing over the past year and a half.”⁴⁸ Finally, the closing two Liberal

members to speak to the bill also reduced their agreement in principle to suspicion of the political strip of the private member who had introduced the bill. The member from St. Catharines concluded that “So why not divert some attention by attacking these various agencies with a bill in the House that’ll divert attention from the government”⁴⁹ which was followed by the member from Kingston and the Islands warning to “make sure that the way the bill will be implemented will be in a real commonsense way, not in the revolutionary sense that these Common Sense Revolutionaries normally talk about.”⁵⁰

Ultimately, regardless of agreement in principle regarding the proposed amendments, the political debate did not become one of accountability for taxpayer dollars but was reduced to opposition politics and reflected partisan cohesion. The debate reflected a combat between the parties as monolithic bodies of particular ideologies who have particular methods of ‘doing things’ as opposed to a combat between backbencher responsibility and executive supremacy.

Similarly, Bill 89 resurfaced in the Ontario legislature four years later, although under a different name and on behalf of a different party. In December 2000, the Liberal Member for Kingston and the Islands, John Gerretsen, introduced Bill 180 as a private member’s bill. Upon prorogation of the house, Bill 180 ‘died’ but was re-introduced by the same member, virtually unchanged, in April 2001. John Gerretsen introduced Bill 5, whose explanatory note again reflected the work being conducted outside the chamber, between the Provincial Auditor, the PAC, and the Minister of Finance, and which was also contained in Bart Maves’ private member’s bill of 1996 and Gerretsen’s earlier version with Bill 180. Bill 5, *The Audit Amendment Act*, contained an explanatory note that read, an act, “to insure greater accountability of hospitals, universities and colleges,

municipalities and other organizations which receive grants or other transfer payment from the government agencies of the Crown.”⁵¹

Once again, the introduction and Second Reading of Bill 5 and its amendments to the *Audit Act*, broadening the scope of legislative auditing to allow for value-for-money audits to be conducted on grant recipients and within the MUSH sector, illustrated an agreement in broad principle across all parties. Despite an opposition member bringing the bill forward, members of both the Progressive Conservatives and the New Democrats spoke in ardent favour. Particularly though, members of the Progressive Conservative caucus endorsed its proposals while illustrating their own government’s alleged work conducted towards its objectives. Debate, and eventually progress, regarding the principle of the legislative auditing mandate review became subservient to partisan promotion.

The members from Durham and Halton used their debate opportunity to ultimately misrepresent their own government’s responsiveness to the broadening of the Provincial Auditor’s powers. The member from Durham commented that “I can only refer to the efforts the government has made in working co-operatively, I might say, with the Provincial Auditor Erik Peters... So I have great confidence in the Auditor. I think they should have a role in making sure that there is wise use of taxpayer’s money in the MUSH sector.”⁵² Similarly, the member from Halton commented that, “This act will address this government's belief that the public has the right to know that their tax dollars are being spent efficiently and in their best interests.”⁵³ Finally, the member from Northumberland used his opportunity to criticize the previous government’s ability to shepherd a mandate review when saying, “I would suggest to him [member from Sault Ste. Marie] that he have a look at the response of this government to what the auditor

suggests. We follow it very closely and take it very seriously. I would suggest to him that he look back at what the NDP did when the auditor came in with reports and how they followed up.”⁵⁴ The fate of Bill 5 was sealed when the bill was discharged from the Standing Committee on Public Accounts in November 2002, a motion was put forward in the house to move third reading, and it disappeared from the legislative books by the end of December 2002. The supremacy of partisan posturing, at the cost of moving legislation forward, appears to be clear.

Finally, Bill 89, Bill 180, and Bill 5 experienced a reincarnation again in the Ontario legislature on May 1, 2003 when John Gerretsen introduced Bill 6, the *Audit Statute Law Amendment Act, 2003*, for first reading. This bill’s life span was relatively short, in legislative terms. As the house rose for the summer in June 2003 and a provincial election was called in early September 2003, Bill 6 never made it past first reading. The Ontario legislature was spared a fourth round of so-called debate regarding progressive steps being taken by government towards enacting a higher and more modern degree of fiscal accountability for tax payer dollars.

Ultimately, this evolution of mandate review has a positive end, albeit a very qualified one. The 2003 provincial election saw the Liberal Party campaign on a number of ‘promises’; whereby amendments to the *Audit Act* were one of many. Subsequently, following a strong victory in October 2003, the Ministry of Finance consulted the Office of the Provincial Auditor regarding its intention to introduce legislation immediately. The then acting Provincial Auditor, Jim McCarter, and senior staff worked with Ministry of Finance staff to draft legislation, incorporating the amendments flushed out between 1989 and 2003. Relatively little work was required for technical preparation. The lawyer in the

Ministry of Finance, which had been involved during the 1990s already had a number of pieces of revised legislation on the books.⁵⁵ The Auditor's office signed off. The Ministry signed off. Bill 18 was introduced in December 2003 and received Royal Assent one year later. The Auditor's new mandate became effective on of April 1, 2005.

New Sub-Heading:

Ontario's process of reviewing the mandate of its chief observer of governmental fiscal accountability, efficiency and economy is clearly convoluted. The sheer length of time required to achieve amendments gives even the most superficial political observer pause to worry. More importantly though, the unraveling of this institutional development raises several very important questions.

The emergence of legislative auditing or the incorporation of an official Provincial Auditor's Office was never designed to direct government spending. Further, this office was not designed to determine how, where, when, and why tax dollars were allotted to particular ministries, agencies, programs, or sectors. Rather, the process of legislative auditing since the 1950s, anyway, has been a tool of parliament to be used after the expenditure of money to clearly see where money is going and whether or not that money is being spent in the most prudent manner, as defined by rigorous accounting standards. That the evolution of legislative auditing has always occurred a step behind the evolution of a political system or parliament makes sense. Legislative auditing is a 'check' on government, and by virtue of that purpose, its functions can only be applied after government has acted. Similarly, changes and revisions to how legislative auditing

is conducted, either provincially or federally, should always reflect changes first adopted by the political institution or system in question.

In the 1980s and increasingly throughout the 1990s, the flow of provincial dollars changed somewhat dramatically. As of March 31 1996, \$28 billion or 48% of government funds were spent by separately governed recipients.⁵⁶ By 2001, 75% of the money spent by the provincial government was no longer under the review of the Provincial Auditor.⁵⁷ In order for a mechanism within a political institution to remain relevant and effective, it must evolve in tandem with, or at least shortly after, changes are experienced within that political institution. Further, if the mechanism in question is one, which acts as a safeguard against the tyranny of power exercised by a government and is supposed to be a tool of parliament and ultimately the 'people', is unable to remain effective, questions of institutional functionality and democratic robustness become very serious questions.

In an interview with Erik Peters, I asked him what led him to hold the perspective that the auditor's mandate should be expanded. He replied that,

“the government was handing over money...without the government having any sense of the quality of the services provided... were they a fat organization? Were they delivering quality services? Did they have the same volume as last year? All these questions had to be asked and they had to be answered and there was only limited information....we felt that within an accountability framework and within an accounting regime these questions needed to be answered.”⁵⁸

Further I also asked if that *Audit Act* or other pieces of provincial statute clearly define how a mandate review is supposed to occur. He replied that,

“...not really and I think that there is a very really problem in this area. The *Audit Act* falls under the Minister of Finance... so what it came down to was how keen the Minister was.... it became very clear to me in January 1992 that there was a real problem with how the province dealt with its public accounts. In the first few years that I was the provincial auditor, I had gone to the standing committee on

finance and told them that I felt the budget was problematic... I said do not budget this way... use accounting rules. My view had always been that if we were going to be dealing with amendments to the *Audit Act*, we should deal directly with the minister and not through the bureaucracy.”⁵⁹

As the historical evolution of legislative auditing in Ontario exhibits an ad-hoc process of mandate review, it is clear that an ambiguous process has sustained itself into the twenty-first century. That the intended channels of mandate review via Ministerial consultation and collaboration between the Provincial Auditor and the PAC failed to move the amendment initiatives forward, the task was left for individual parliamentarians to deal with. Several private members’ bills brought the issue forward within the legislative arena, however to no avail. The particular *Audit Act* amendments which floated through the corridors of Queen’s Park throughout the 1990s and that were finally adopted into provincial statute in October 2004, directly targeted the level of fiscal accountability among government transfer recipients. Additionally, as they also indirectly targeted the general fiscal responsibility of the province, the inability of individual MPPs to conduct an effective mandate review is not entirely surprising.

Firstly, the theory that individual parliamentarians can adequately steer a mandate review of a legislative auditing regime within the legislative arena^{III} contains several challenges. With this particular case, where locally run entities, such as hospitals, school boards, universities, and colleges are the bodies in question there is a normative difficulty in having MPPs stand up and demand a higher degree of accountability of these organizations and to sanction a provincial officer of the legislature with the authority to conduct value-for-money audits of these organizations. Individual MPPs face a number of challenges and objectives when standing in the legislature. On one hand, they face an

executive-steered system of government which they are compelled to keep in check through a series of mechanisms, where legislative auditing is one. On the other hand though, they are there to accomplish another job and that is one where they are to act as the voices of groups, sectors, and individuals in their riding. Finally, individual MPPs, increasingly so in Ontario during the 1990s and today, also face a parliament that is characterized to some extent by fierce partisan divides. The days of collective politicking and centrist of the road politics are gone and therefore the necessity to marry yourself to your party is paramount. The conjecture that suggests that individual parliamentarians are certainly compelled by wanting to hold the executive to task, regardless of what side you sit on, is somewhat of an outdated thesis to apply, particularly within Ontario over the last two decades and in regards to this specific policy question concerning locally delivered services and locally operated agencies.

The failures of the private members' bills dealing with amendments to the *Audit Act* reflect these institutional and normative challenges. They also underscore the need to devise a more functional system of mandate review for the bodies, which are designed to protect and ensure fiscal accountability. So long as there is not a clearly established and formal process of mandate review required to occur between the Minister responsible for the officer of the legislature in question, the legislative committee responsible (if there is one), and the appointed head of the office of the legislature in question, the method of last resort falls to an understandably schizophrenic group of individual parliamentarians whose range of tools consist of the forever-destined to fail-private member's bill.

ⁱⁱⁱ See Paul G. Thomas' article entitled, "The Past, Present, and Future of Officers of Parliament" in Canadian Public Administration, Volume 46, No. 3 (Fall 2003).

The consequences of a legislative auditing regime, which subsisted in a state of, arrested development for the better part of fifteen years is beyond the scope of this paper. Establishing if a failure to adequately report on the fiscal health of the province has led to budgetary dilemmas seen today, would be a very informative causal relationship to be used by political scientists. However, it is reasonable to at least entertain that Ontario's institutional inability to successfully and efficiently modernize the scope of legislative auditing has had residual effects. In a relatively stable political system such as the one inhabited by Ontario and within a country that is by comparison economically robust, whatever residual effects that may have been deposited by this failed mandate review have likely not been catastrophic. However, to perhaps clearly illustrate the potential gravity of this institutional failure, I would like to briefly touch upon the international consulting which the Provincial Auditor's office has engaged in, over the past four years.

Increasingly over the last four years, the Office of the Provincial Auditor in Ontario has become a recognized expert in the field of legislative auditing by international delegations. Frequently, delegations from countries in the less developed world have visited this office in particular, as well as Ontario's Public Accounts Committee. They have done so to amass best-practice information in order to conduct successful implementations of similar bodies in their home countries. Between 2003 and 2004 alone, delegations from China, Ethiopia, Kenya, and Vietnam visited Ontario in a bid to maximize their own adoptions of legislative auditing regimes. Senior staff members from the Provincial Auditor's office were visited as were PAC committees. June 2005 will mark the current Provincial Auditor's over-seas visit to Russia to offer

tutorials and consultation sessions with officials there regarding the implementation of legislative auditing regimes and best-practices.⁶⁰

If there is any support for the idea that Ontario's lapse in adopting amendments to the *Audit Act* yielded negative effects on the province, from a fiscal standpoint, what would be the fate of such a process unfolding in a country that is in a transition to a democracy or attempting to achieve higher degrees of fiscal accountability? The normative principles underpinning legislative auditing are centered upon a need to ensure that a small elite group of power mongers in parliament are required to show how they have spent money and for an objective party to comment upon the economy and efficiency of programs or agencies which received funds sanctioned by this small group. They also rest upon an attempt to effect citizen trust in the institutions which are there to serve them. Legislative auditing is in principle a tool to open firstly the executive up to parliament and secondly and most importantly the political realm to the citizenry. It is most critical for these two processes to be executed in a country that is either institutionally young, economically unstable, or in a transition to a new regime.

I suspect that for purposes of institutional building and for transitions to democracy it is critical for legislative auditing regimes to be developed. However, as Ontario has exhibited, the adoption of such a regime and its derivative officer of the legislature do not necessarily mean that it is functional and effective. The means by which mandate reviews are conducted and completed very much determine the efficacy of this institutional mechanism. Simply put, in order to sustain fiscal transparency and trust (among citizens and parliamentarians) in government, this body is very helpful. Further, as countries regardless of location will be forced to deal with large spending

budgets and the potential for a downloading of services to local levels and therefore experiencing an increase in transfer payment recipients, it is imperative that a legislative auditing regime is adopted.

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