



How to Create an Officer of Parliament: Lessons from the Disputed Status of the Parliamentary Budget Officer

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On March 14, 2008, the Conservative Government announced the appointment of Kevin Page as Canada's first Parliamentary Budget Officer (PBO). Since that date, the PBO has become embroiled in a debate with the Speakers of the House of Commons and the Senate and the Parliamentary Librarian over whether he is only an "Officer of the Library of Parliament" or whether he has the coveted status of an "Officer of Parliament."

This article reviews the key events leading to the dispute, the issues surrounding the status of the PBO, and identifies how a position should be configured to ensure that it will be an "Officer of Parliament."

Prologue. At the time of writing this article, the Office of the Parliamentary Budget Officer (OPBO) website indicates that it has issued four reports and four briefing notes. The reports include the results of stakeholder consultations on the role of the PBO, the costs of the Afghan war and the methodology for estimating these costs, and an economic and fiscal assessment. Briefing notes were issued on the government's economic and the fiscal forecasting process, on key issues for parliamentarians in the 2008 economic and fiscal statement, on the spectre of deflation, and on the budgetary balance and economic cycle. In addition, in October 2008 the PBO confirmed that he is undertaking a review of the costs of large information technology projects.

Not unexpectedly, the PBO's release of these studies resulted in headlines. The October 9, 2008 *Ottawa Citizen* headline predicted the PBO Afghan war report would "expose archaic accounting

practices, lack of transparency," and the *Edmonton Journal's* October 10, 2008 headline proclaimed "Afghan mission tab: \$18.1B; Government doesn't have own numbers straight, reports author chides."

The Disputed Status of the PBO. According to the OPBO website the PBO has "a broad mandate to support Parliament in holding government to account for the good stewardship of public resources", and, is specifically mandated "to provide *independent analysis* to the Senate and the House of Commons regarding the state of the nation's finances, the government estimates and trends in the national economy;" and to "provide analytical support to any committee of the House of Commons during its consideration of the estimates... (and) to any Member of Parliament regarding the financial cost of proposals." The OPBO's December 2008 Operational Plan added that the "PBO's analysis will be openly reported to committees and parliamentarians and will be freely-accessible to all on its public website." The OPBO also noted that if it is denied access to requested information it will report the matter to Parliament, if the denial is related to information being in a cabinet confidence "it may request that the Clerk of the Privy Council certify this position in writing," and "in cases of deadlock and as a last resort [it] reserves the right to seek legal remedy in the Federal Court of Canada."

The PBO's interpretation of his mandate is not inconsistent with the Conservative Party 2006 Election Platform that called for "truth in budgeting." Pointing to significant underestimating of surpluses by Liberal governments in 2004-

05 and 2005-06 the Conservative Party's Platform argued that government "cannot be held to account if Parliament does not know the accurate state of public finances." Thus, the Conservative election platform called for the creation of a "Parliamentary Budget Authority to provide objective analysis **directly** to Parliament about the state of the nation's finances and trends in the national economy" (my emphasis); and for a requirement that "government departments and agencies to provide accurate, timely information to the Parliamentary Budget Authority to ensure it has the information it needs to provide accurate analyses to Parliament."

However, on November 4, 2008 an internal dispute within Parliament over the mandate of the PBO became public. The *Ottawa Citizen* reported that it had obtained an October 28, 2008 letter written by the Speaker of the Senate Noel Kinsella and the Speaker of the House of Commons Peter Milliken addressed to the Parliamentary Librarian William Young indicating that in their opinion the PBO was "exceeding" his authority and that he should be required to function within an "appropriate accountability and operating framework."

The Speakers' letter argues that the amendments to the *Parliament of Canada Act*:

1. Clearly established the OPBO within the Library of Parliament.
2. Nowhere established the PBO as an independent officer of the Library of Parliament or Parliament.
3. Clearly established that the PBO is subject to the control and management of the Parliamentary Librarian

with the overall direction and control of the Library resting with the Speakers.

The Speakers' assert that the PBO role was structured to ensure his advice is independent of the Executive and was not intended to create an independent office within the Library or establish an Officer or Agent of Parliament. Thus, they concluded:

Parliament's intention in establishing the Parliamentary Budget Officer position within the Library was to augment and enhance the resources available to parliamentarians in the conduct of their business. It was certainly not intended to put the Officer at the centre of parliamentary or public debates or to impinge on parliamentarians' constitutional function of overseeing the Executive.

The PBO responded to the Speakers' letter in his Operational Plan. To support his interpretation of his mandate, the PBO refers to a statement in the Senate by Senator Donald Oliver, that the Parliamentary Budget Officer is, "an independent Officer of the Library of Parliament who reports to the Speakers of both chambers." He also referred to a press release by the Leader of the Government in the House stating that the PBO reports to the Speakers of both chambers and presents his findings to the Committees named in the *Parliament of Canada Act* and *Canadians*. The PBO concludes that the Speakers' letter raises issues that "need to be resolved in consultation with parliamentarians and a decision made by the latter as to whether or not the mandate of the PBO can be best fulfilled through a model that is not open, transparent and independent."

The Conservative Government's March 2008 announcement of the appointment of Mr. Page as PBO did state that the PBO is an "independent officer of the Library of Parliament who reports to the Speakers of both chambers" and that he "will provide independent analysis to Canadians on the state of the nation's finances." However, left undefined was whether or not the phrase "an independent officer of the Library of Parliament" was the same as an "Officer of Parliament" consistent with the mandate of such entities as the

Office of the Auditor General or the Chief Electoral Officer. The November 20, 2008 Senate Debates indicate that the Conservative Government does not plan to intervene in the dispute. The Debates report that the Leader of the Conservative Government in the Senate stated that in the PBO's testimony before the Senate it was clear to the PBO that he was an "officer of the Library of Parliament," and that the dispute over his status was a matter for the Library of Parliament and the Speakers of both chambers to resolve, and "it is not a matter for the government."

The PBO's interpretation of the broad scope of his mandate has received support. The November 4, 2008 Ottawa Citizen article quoted Conservative Senator Hugh Segal as being in 100% disagreement with the Speakers arguing that "any effort to limit the freedom and operation of the parliamentary budget office dilutes the principle of his appointment and purpose of the office," and accusing the Speakers of "getting caught up in the bureaucracy of Parliament rather than defending [basic] principles."

At the time of writing this article, the intensity of controversy appeared to be increasing. The OPBO's Operational Plan foresaw a budget of \$1.85 million in 2008-09 climbing to \$2.8 million in 2009-10 with a staff of 17 to 20 people. However, a December 19, 2008 Ottawa Citizen article reported that the PBO had been informed by the Library of Parliament that its funding would be frozen at its start up level of \$1.8 million. In response, the Liberal finance critic, Scot Brison, is quoted as calling on the Conservative Government to not attack the PBO's capacity to serve parliamentarians.

The PBO's Legislated Mandate. To help understand the dispute it is helpful to examine the PBO's legislated mandate. The *Parliament of Canada Act* contains the provisions establishing the PBO. The PBO was made an officer of the Library of Parliament, appointed by the Governor in Council (GIC), also in another guise known as Cabinet advised by public servants in the Privy Council Office, to hold office **during pleasure**

for a fixed renewable term of not more than five years (my emphasis). The GIC was authorized to select the PBO from a list of three names submitted in confidence, through the Leader of the Government in the House of Commons, by a committee formed and chaired by the Parliamentary Librarian. The GIC was given the authority to set the salary of the PBO.

The mandate of the PBO is to provide **independent analysis** to the Senate and the House of Commons about the state of the nation's finances, the estimates of the government and trends in the national economy. The PBO is also to undertake research into the nation's finances and economy **when requested** by the following committees: the Senate Finance Committee, the House of Commons Finance Committee, the House of Commons Public Accounts Committee, or a committee of the Senate or the House of Commons that is mandated to consider specific estimates of the government. In addition, the PBO **when requested** by a member of either House or a committee of either House is to estimate the financial cost of any proposal that relates to a matter over which Parliament has jurisdiction (my emphasis).

The PBO is entitled, by request to a deputy head of a department, to free and timely access to any financial or economic information in the possession of the department that is required for the performance of the PBO's mandate. However, this right of access does not apply to the disclosure of personal information or to information contained in a confidence of the Queen's Privy Council (a cabinet confidence, e.g., Memorandum to Cabinet, Treasury Board Submission) unless the information is also contained in any other record of a government institution.

The PBO cannot disclose any financial or economic information unless the disclosure is essential for the performance of the PBO's mandate and the disclosure does not contain information obtained in confidence relating to other governments, federal-provincial affairs, the economic interests of Canada, e.g., trade secrets, prejudicial to competitive interests, materially injurious to the abil-

ity of the government of Canada to manage the economy of Canada, and third party and personal information.

With regard to management authority, the PBO is authorized to enter into contracts, and engage experts on a temporary basis. However, these powers are subject to the authority of the Parliamentary Librarian who is given the rank of a deputy minister and the control and management of the Library. In turn, the Library of Parliament and its officers and clerks are subject to the direction and control of the Speakers of the two Houses with the assistance of a joint committee of the Senate and the House of Commons.

Obviously, the legislation is sufficiently ambiguous to support both the Speakers' and the PBO's interpretation, particularly the section mandating the PBO to "provide independent analysis to the Senate and to the House of Commons about the state of the nation's finances, the estimates of the government and trends in the national econo-

my." One key question is whether this authority and those relating to responding to requests from parliamentary committees implicitly authorize the PBO to report directly to Parliament and its committees.

No doubt, competing legal opinions can be obtained on this and other issues. However, clearly the PBO was not established with a legislated mandate fully comparable to an Officer of Parliament such as the Office of the Auditor General. For example, it was not established as a separate office with its own legislation.

The Privy Council Office (PCO) made its position on the status of the PBO clear on February 13, 2008 before the House of Commons Finance Committee. In response to a question on the status of the PBO, Marc O'Sullivan, Assistant Secretary to the Cabinet, Senior Personnel and Special Projects stated that the PBO was an employee of the Library of Parliament. According to Mr. O'Sullivan,

The act provides that the Parliamentary

Budget Officer must be an employee of the Library of Parliament. If Parliament wished to establish a position similar to those of other parliamentary officers, that is to say, a completely independent position with an independent office outside existing structures, we would have had our orders and the position would have been clear. However, since the act provides that the Parliamentary Budget Officer must be an employee of the Library of Parliament that means the Parliamentary Budget Officer would be part of the framework governing parliamentary employees. This is not a decision made by the government, but an inherent aspect of the parliamentary structure.

Mr. O'Sullivan further noted that when the PCO received the position description, "we discussed required qualifications and other considerations with people from the parliamentary librarian's office. From the very start, it was agreed that the person in question would report to the parliamentary librarian."

How to Create an Officer of Parlia-

YOUR CHALLENGES

Activity-based management

Dynamic process model

Compliance

Governance

Capacity analysis

Cost accounting

Performance indicators

Scenario

Multidimensional data mining

Variance analysis

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ment. Parliamentarians may not have gotten the fully mandated PBO that some may have expected. If parliamentarians want to be sure they get an Officer of Parliament and not create a disputed mandate, then they are going to need to know what the mandate of such an Officer looks like. They need a checklist. Such a checklist can be created from the best practices used to create the mandates of acknowledged Officers of Parliament.

The Parliament of Canada website identifies the following entities as “Officers of Parliament:” the Auditor General, the Chief Electoral Officer, the Official Languages Commissioner, the Privacy Commissioner, the Access to Information Commissioner, the Conflict of Interest and Ethics Commissioner, the Commissioner of Lobbying, and the Public Sector Integrity Commissioner. The website notes that the “Privy Council Office documents...refer to these officers as ‘Agents of Parliament’ to emphasize that they carry out the work of Parliament and are responsible to Parliament, and as a means of distinguishing them from other officers and officials of Parliament.

Based on the best practices used to develop the legislative mandates of these Officers of Parliament, the legislation creating an Officer of Parliament should ensure that the Office has an independent office with its own enabling legislation. The legislation should establish an Officer that:

1. Is appointed by the GIC by commission under the Great Seal after consultation with all parties in the House of Commons and Senate and upon resolution of the House of Commons or both the Senate and the House of Commons.
2. Serves during good behavior (not at the pleasure of the Prime Minister like Deputy Ministers).
3. Can be removed only for cause by the GIC on address to the Senate and the House of Commons.
4. Is appointed for a non-renewable tenure, preferably for 10 years. This non-renewability provision reduces the chances of an incumbent being tempted to curry re-appointment

while encouraging the appointment of senior experienced individuals for whom this would be a late career appointment.

5. Is remunerated at the level of a Federal Court judge or a Supreme Court judge to avoid the PCO establishing the rank and salary of the Officer.
6. Has a clear set of responsibilities.
7. Has a clear and unfettered right of access to the information required to fulfill these responsibilities. Parliamentarians need to be alerted to access being compromised by references to provisions of the *Access to Information Act* or the *Privacy Act* or by restrictions on access to information in that information may be placed in Cabinet confidences in order to reduce access.
8. Has clear authority to report to Parliament on matters relating to their responsibilities through the Speaker of one or both Houses who would be required to present the PBO’s reports to Parliament forthwith after receiving it.
9. Has the authority to prepare estimates for funds to be voted by Parliament for the operations of their office.
10. Has the full authority to control and manage their offices, including contracting and human resources. Parliamentarians need to be aware that if an Officer is listed on an inappropriate schedule of the Financial Administration Act then the Treasury Board and its Secretariat can gain backdoor control over the Office. Moreover, there is clear need for Parliament to create a schedule of Officers of Parliament that significantly circumscribes or eliminates Treasury Board and Privy Council Office control over these Officers.

Conclusion. This article does not

address the pros and cons of whether the PBO should have the powers of an Officer of Parliament. What is clear is that the PBO was given the status of an Officer of the Library of Parliament and that the legislated mandate is not fully comparable to the mandate of other Officers of Parliament. Ultimately, this may circumscribe the wishes of the PBO and frustrate parliamentarians.

There are several paths out of the current impasse. The Parliamentary Librarian and the Speakers’ of the House of Commons and the Senate could accept that the PBO is an Officer of Parliament or at a minimum authorize the PBO to operate as if he were an Officer of Parliament. The PBO could receive sufficient support from members of the House of Commons and the Senate, in particular from the Finance Committees of the Senate and the House, and the House of Commons Public Accounts Committee to function as an Officer of Parliament making it difficult for the Speakers to constrain the PBO. Of course, if requested by the Speakers, the Cabinet, if it is willing to absorb the potential political costs could always remove the incumbent PBO who serves “at pleasure.”

However, if parliamentarians want a PBO that is undisputedly an Officer of Parliament, then they are going to have to ensure that the enabling legislation is revised to create such an Officer. To this end, this article presents a checklist for creating an Officer of Parliament. Thorough questions need to be asked by parliamentarians. If the answers given by ministers or senior officials of the PCO at the time of review by parliamentary committees do not clearly state that the proposed legislation gives the proposed officer the powers identified in the checklist, then something other than an Officer of Parliament is being created.

About the Author

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